1099

No. 2974

United States Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff in Error,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

(Amended Complaint.)

Comes now plaintiff above named, and by permission of the Court first had and obtained, files this its amended complaint herein, and for cause of action complains of defendant and alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business, in the city and county of San Francisco, State of California, Northern District thereof; and defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of California, with its principal place of business in said city and county of San Francisco.

II.

That defendant is indebted to plaintiff in the sum of $16,961.30, with interest thereon as hereinafter stated, for money had and received by defendant to and for the use of plaintiff within two years prior to the time of the commencement of this action, to wit, on the 18th day of November, 1912, at said city and county of San Francisco, defendant received from [1*] plaintiff the sum of $9,821.30, and at the same place on the 26th day of November, 1912, defendant further received from plaintiff the sum of $7,140, all to and for the latter's use, making the total amount so received by defendant from plaintiff as aforesaid the said sum of $16,961.30.

III.

That no part of said sum of $16,961.30 has ever been paid by or on behalf of defendant to plaintiff, although demand has been made therefor; and said amount of $16,961.30, together with interest thereon from the respective dates of payment aforesaid, at the rate of seven per cent per annum, is now wholly due, owing and unpaid from defendant to plaintiff.

And for a further, separate and second cause of action against defendant, plaintiff alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business, in the city

*Page-number appearing at foot of page of original certified Transcript of Record.

and county of San Francisco, State of California, Northern District thereof; and defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of California, with its principal place of business in said city and county of San Francisco.

II.

That on the 16th day of November, 1911, the parties hereto entered into a certain written contract for the purchase by plaintiff and sale by defendant of certain salmon thereafter to be packed, shipped and transported by defendant to said city and county of San Francisco, and there delivered to plaintiff, a copy [2] of which contract is hereunto annexed for reference and marked Exhibit "A."

That as a part of said contract it was understood and agreed by plaintiff and defendant that said "Archer" brand salmon would be merchantable, edible and suitable for human consumption and of the condition and quality that would entitle it by law to be brought into said city and county of San Francisco and thereafter sold.

III.

That after entering into said contract defendant packed and thereupon shipped and transported from Alaska to said city and county of San Francisco, and thereafter, and on or about the 18th day of October, 1912, there delivered to plaintiff, among other merchandise, 5,000 cases of salmon known as do-over grade of Red Alaska salmon labeled and

further known as "Archer" brand. Plaintiff received said salmon without inspecting or examining it, or any part of it, and in reliance upon the representations theretofore made respecting it and samples theretofore given by defendant to plaintiff as hereinafter narrated.

IV.

That before the delivery to and receipt by plaintiff of said "Archer" brand salmon defendant represented to plaintiff that said salmon was merchantable, edible, fit for human consumption, and of the condition and quality that entitled it by law to be brought into said city and county and thereafter sold; and defendant submitted to plaintiff a certain quantity of salmon which was then and there represented by defendant to be true samples of the kind, character and condition of said "Archer" brand of salmon, and which defendant claimed would be delivered to plaintiff under said contract. Said samples were thereupon inspected and examined by plaintiff and ascertained to consist [3] of salmon which was edible, fit for human consumption, merchantable, and equal in quality and condition to the 1911 pack of said salmon, which was also edible and fit for human consumption. Without opening each tin of salmon it was and is impossible to determine whether the same was or is edible, fit for human consumption and merchantable, or unmerchantable, inedible, tainted, putrid, sour, decomposed or rotten; and the expressions contained in said contract, to wit, " 'Archer' brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty

tins to be taken therefrom, after which no reclamation of any natures will be allowed," and "buyers have privilege of inspecting salmon before taking delivery," were understood by both parties hereto to mean that after defendant had removed from said salmon all swells, so called, and rusty tins, whose presence can be determined by an outward inspection thereof, plaintiff was to be given an opportunity of inspecting said salmon to determine whether all of said swells and rusty tins had been so removed therefrom, and thereafter no reclamation was to be allowed to plaintiff for cans of salmon which were, or should thereafter become, or develop, swells, or whose tins were rusty or should develop rust.

V.

That shortly after the delivery by defendant to plaintiff of said 5,000 cases of "Archer" brand salmon, and in sole reliance upon said samples and representations, and in the belief that said 5,000 cases of said "Archer" brand salmon was merchantable, edible and fit for human consumption, and a proper article of commerce, and in ignorance of the actual quality and condition of said 5,000 cases of "Archer" brand salmon, hereinafter set forth, plaintiff paid to defendant therefor the sum of $16,961.30 at the times and in the amounts, respectively, as follows, to wit, on November 18, 1912, the sum of $9,821.30, and on November 26, 1912, the sum of $7,140, being the entire purchase price of said salmon called for in and by said contract. [4]

VI.

That said 5,000 cases of "Archer" brand salmon

was not, at the time the same was shipped and transported from said Alaska to said city and county of San Francisco, and at the time said merchandise was so delivered by defendant to plaintiff as aforesaid, merchantable, edible or fit for human consumption, but, on the other hand, was unmerchantable, inedible, tainted, putrid, sour, decomposed and rotten, and unfit for human consumption, and was adulterated within the meaning of the Pure Food and Drug Act of Congress approved June 30, 1906, and also within the meaning of the act of the legislature of said State of California entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an appropriation therefor," approved March 11, 1907; and its shipment, transportation and delivery to plaintiff as aforesaid and all traffic in said merchandise was and is in violation of each of said Acts.

VII.

That the sole consideration for the payment by plaintiff to defendant of said sum of $16,961.30 as aforesaid was and is the delivery to plaintiff of 5,000 cases of said "Archer" brand do-over grade of Red Alaska Salmon in an edible condition and suitable for human consumption and a legitimate article of commerce.

VIII.

That at, or shortly after, the time of the shipment, transportation and delivery of said "Archer" brand

of salmon to, and payment therefor by, plaintiff, as aforesaid, and prior to the time of the commencement of this action, defendant well knew of the true condition and quality of said merchandise, and that the same was in the condition and of the quality hereinbefore set forth when it arrived at said city and county of San Francisco [5] and was delivered as aforesaid; but defendant has failed, neglected and refused to return or pay to plaintiff said sum of $16,961.30, or any part thereof, or any interest thereon, and no part of said money has been paid or returned by or on behalf of defendant to plaintiff.

And for a further, separate and third cause of action against defendant, plaintiff alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business in the city and county of San Francisco, State of California, Northern District thereof; and plaintiff at all the times herein stated was, and is now, engaged in the business, among other things, of buying, selling and exporting canned goods, including salmon.

Defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of California, with its principal place of business in said city and county of San Francisco;

and defendant was at all of such times, and is now, engaged in the business of packing, transporting and selling salmon to the trade therein.

II.

That on the 16th day of November, 1911, the parties hereto entered into a certain written contract, a copy whereof is hereunto annexed, marked Exhibit "A," and made a part hereof, wherein and whereby plaintiff agreed to purchase, and defendant agreed to sell, certain salmon of the kind, quality and quantity, and subject to the terms, conditions and agreements therein expressed and contained, and as expressed and contained in the act of [6] Congress and act of the legislature of said State of California hereinafter referred to. Among other things, it was and is provided in said contract that said salmon should be equal to the 1911 pack, meaning thereby that said salmon should be equal in quality and condition to the same brand of salmon, to wit, "Archer" brand, packed by defendant in the year 1911, which was of good quality and condition, edible and suitable for human consumption; and it was also therein understood and agreed that said salmon should not be adulterated within the meaning of said act of Congress and said act of the legislature and should be merchantable and a proper subject for commerce thereunder.

III.

That at all times herein stated defendant well knew that plaintiff was engaged in the business of buying, exporting and selling to the trade therein, as aforesaid, canned salmon, among other articles

of commerce, and at the time said contract was entered into as aforesaid none of the salmon therein referred to had been packed, but the same was to be thereafter packed by defendant in Alaska and shipped by it to said city and county of San Francisco, and there delivered to plaintiff.

IV.

That after entering into said contract defendant packed during the year 1912, and thereupon shipped and transported from said Alaska to said city and county of San Francisco, and thereafter, and on or about the 18th day of November, 1912, there delivered to plaintiff, among other merchandise, 5,000 cases of said salmon known as do-over grade of Red Alaska Salmon, "Archer" brand. Plaintiff received said salmon without inspecting or examining it, or any part of it, and in reliance upon said contract and samples theretofore given by defendant to plaintiff, as hereinafter narrated. During all the times herein stated it was and is the custom prevailing in the trade of canned salmon, [7] and practiced for several years between the parties hereto, for the seller to furnish to the purchaser thereof samples of the salmon so bought and sold, and in accordance with said custom canned salmon was and is bought and sold in the trade upon samples so furnished, and plaintiff repeatedly so purchased canned salmon from defendant, and not otherwise.

V.

That before the delivery to, and receipt by, plaintiff of said "Archer" brand salmon, defendant submitted to plaintiff a certain quantity of salmon,

which was then and there represented by defendant to be true samples of the kind, character and condition of said "Archer" brand of salmon, and which defendant claimed would be delivered to plaintiff under said contract. Said samples were thereupon inspected and examined by plaintiff and ascertained to consist of salmon which was edible, fit for human consumption, merchantable, not adulterated within the meaning of the congressional and legislative acts aforesaid, and equal in quality and condition to the said 1911 pack of said salmon. It was and is impossible to determine from a mere inspection of said canned salmon, and without opening each tin of salmon, whether the same was or is edible, fit for human consumption and merchantable, or unmerchantable, inedible, tainted, putrid, sour, decomposed or rotten; and the expressions contained in said contract, to wit, " 'Archer' brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature will be allowed," and "buyers have privilege of inspecting salmon before taking delivery," were understood by both parties hereto to mean that after defendant had removed from said salmon all swells, so-called, and rusty tins, whose presence can be determined by an outward inspection thereof, plaintiff was to be given an opportunity of inspecting said salmon to determine whether all [8] of said swells and rusty tins had been so removed therefrom, and thereafter no reclamation was to be allowed to plaintiff for cans of salmon which were, or should thereafter become, or

develop, swells, or whose tins were rusty or should develop rust.

VI.

Shortly after the delivery by defendant to plaintiff of said 5,000 cases of "Archer" brand salmon, and in sole reliance upon said contract, samples and representations, and in the belief that said 5,000 cases of said "Archer" brand salmon was merchantable, edible and fit for human consumption and a proper article of commerce, and in ignorance of the actual quality and condition of said 5,000 cases of "Archer" brand salmon, hereinafter set forth, plaintiff paid to defendant therefor the sum of $16,961.30 at the times and in the amounts, respectively, as follows, to wit, on November 18, 1912, the sum of $9,821.30, and on November 26, 1912, the sum of $7,140, being the entire purchase price of said salmon called for in and by said contract.

VII.

That said 5,000 cases of "Archer" brand salmon was not, at the time the same was shipped and transported from said Alaska to said city and county of San Francisco, and at the time said merchandise was so delivered by defendant to plaintiff, as aforesaid, merchantable, edible or fit for human consumption, nor equal to said 1911 pack of said salmon; but, on the other hand, was unmerchantable, inedible, tainted, putrid, sour, decomposed and rotten and unfit for human consumption, and was adulterated within the meaning of the Pure Food and Drug Act of Congress approved June 30, 1906, and also within the meaning of the act of the legislature of said State

of California entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabelled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an [9] appropriation therefor," approved March 11, 907, hereinbefore referred to, and its shipment, transportation and delivery to plaintiff as aforesaid, and all traffic in said merchandise, was and is in violation of each of said acts.

VIII.

That by reason of defendant's breach of contract, as aforesaid, plaintiff has been damaged in the sum of $17,404.21, no part whereof has been paid.

And for a further, separate and fourth cause of action against defendant, plaintiff alleges:

I.

That plaintiff is now, and at all times herein mentioned was, a citizen and resident of the State of Virginia, to wit, a corporation duly created, organized and existing under and by virtue of the laws of said State of Virginia, doing and authorized to do business, and having a place of business in the city and county of San Francisco, State of California, Northern District thereof; and plaintiff at all the times herein stated was, and is now, engaged in the business, among other things, of buying, selling and exporting canned goods, including salmon.

Defendant is now, and at all times herein mentioned was, a citizen and resident of said State of California, to wit, a corporation duly created, organized and existing under and by virtue of the laws of

said State of California, with its principal place of business in said city and county of San Francisco; and defendant was at all of such times, and is now, engaged in the business of packing, transporting and selling salmon to the trade therein.

II.

That on the 16th day of November, 1911, the parties hereto entered into a certain written contract, a copy whereof is hereunto annexed, marked Exhibit "A," and made a part hereof, wherein and [10] whereby plaintiff agreed to purchase, and defendant agreed to sell, certain salmon of the kind, quality and quantity, subject to the terms, conditions and agreements therein expressed and contained, and as expressed and contained in the Act of Congress and act of the legislature of said State of California hereinafter referred to. Among other things, it was and is provided in said contract that said salmon should be equal to the 1911 pack, meaning thereby that said salmon should be equal in quality and condition to the same brand of salmon, to wit, "Archer" brand, packed by defendant in the year 1911, which was of good quality and condition, edible and suitable for human consumption; and it was also therein understood and agreed that said salmon should not be adulterated within the meaning of said act of Congress and said act of the legislature and should be merchantable and a proper subject for commerce thereunder.

III.

That at all times herein stated defendant well knew that plaintiff was engaged in the business of buying,

exporting and selling to the trade therein, as aforesaid, canned salmon, among other articles of commerce, and at the time said contract was entered into as aforesaid none of the salmon therein referred to had been packed, but the same was to be thereafter packed by defendant in Alaska and shipped by it to said city and county of San Francisco, and there delivered to plaintiff.

IV.

That after entering into said contract defendant packed during the year 1912, and thereupon shipped and transported from said Alaska to said city and county of San Francisco, and thereafter, and on or about the 18th day of October, 1912, there delivered to plaintiff, among other merchandise, 5,000 cases of said salmon known as do-over grade of Red Alaska salmon, labelled and further known as said "Archer" brand. Plaintiff received said salmon [11] without inspecting or examining it, or any part of it, and in reliance upon defendant's representations hereinafter set forth, and upon said contract and samples theretofore given by defendant to plaintiff, as hereinafter narrated. That during all the times herein stated it was and is the custom prevailing in the trade of canned salmon, and practiced for several years between the parties hereto, for the seller to furnish to the purchaser thereof samples of the salmon so bought and sold, and in accordance with said custom canned salmon was and is bought and sold in the trade upon samples so furnished, and plaintiff repeatedly so purchased canned salmon from defendant, and not otherwise.

V.

That prior to the time of the delivery of said salmon as aforesaid, and in order to induce plaintiff to accept delivery of, and pay for, the same, and to make no inspection or examination thereof, defendant furnished plaintiff with certain cans of salmon which defendant then and there represented to plaintiff to be true samples of the quality, character and condition of said "Archer" brand of salmon mentioned in said contract, said samples consisting of salmon which was edible and suitable for human consumption and equal to said 1911 pack of "Archer" brand do-over salmon. Also before the delivery of said 5,000 cases of salmon defendant represented to plaintiff, as a further inducement to the latter to take said merchandise, that said salmon was the best lot of said "Archer" brand do-over salmon the defendant had ever packed. Upon ascertaining the character, condition and quality of the salmon contained in said samples, and in ignorance of the true quality, condition and character of the 5,000 cases of salmon specified in said contract, plaintiff accepted and took delivery of said 5,000 cases of salmon as aforesaid, and paid defendant therefor thereafter the sum of $16,961.30 as follows: On November 18, 1912, the sum of $9,821.30 and on November 26, 1912, [12] the sum of $7,140.

VI.

That said 5,000 cases of "Archer" brand salmon was not, at the time the same was shipped and transported from said Alaska to said city and county of San Francisco, and at the time said merchandise was

so delivered by defendant to plaintiff, as aforesaid, merchantable, edible or fit for human consumption, nor equal to said 1911 pack of said salmon; but, on the other hand, was unmerchantable, inedible, tained, putrid, sour, decomposed and rotten and unfit for human consumption, and was adulterated within the meaning of the Pure Food and Drug Act of Congress approved June 30, 1906, and also within the meaning of the act of the legislature of said State of California entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabelled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an appropriation therefor," approved March 11, 1907, hereinbefore referred to, and its shipment, transportation and delivery to plaintiff as aforesaid, and all traffic in said merchandise, was and is in violation of each of said acts.

VII.

Plaintiff further alleges that by reason of the representations so made by defendant as aforesaid, and the furnishing by it of samples to plaintiff, as hereinbefore set forth, prior to the time of the delivery of said merchandise, defendant is estopped from asserting or maintaining that inspection of said 5,000 cases of do-over grade of Red Alaska salmon "Archer" brand was required of plaintiff by said contract, or that no recovery for a breach of said contract can be had by plaintiff by reason of its failure to make said inspection.

VIII.

That by reason of the fact aforesaid, plaintiff has been damaged in the sum of $17,404.21, no part whereof has been paid. [13]

WHEREFORE, plaintiff prays for judgment against defendant for said sum of $16,961.30, together with interest on the sum of $9,821.30 thereof from the 18th day of November, 1912, and on the remaining sum of $7140 thereof from the 26th day of November, 1912, or for such other relief as it may be entitled to receive, together with its costs of suit in this behalf incurred.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

Northern District of California,
City and County of San Francisco,—ss.

L. A. Ward, being first duly sworn, deposes and says:

That he is an officer, to wit, the vice-president of American Trading Company (Pacific Coast), a corporation, plaintiff herein, and makes this verification on behalf of said corporation; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters that are therein stated on information or belief, and as to those matters he believes it to be true.

L. A. WARD.

Subscribed and sworn to before me this 18th day of February, 1916.

[Seal] JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California. [14]

Exhibit "A" to Amended Complaint—Contract.

San Francisco, Cal., Nov. 16th, 1911.

The NORTH ALASKA SALMON COMPANY, of San Francisco, California, have sold and the AMERICAN TRADING COMPANY (Pacific Coast) of the same place have bought all of the seller's 1912 season's pack of the following grades and brands of salmon:

No. 2 Grade of Red Alaska Salmon, labeled "Polar King."

Do-over Grade of Red Alaska Salmon, labeled "Archer."

It is understood that the quantity sold shall not exceed three thousand (3000) cases of "Polar King" brand and five thousand (5,000) cases of "Archer" brand.

PRICE of the "Archer" brand to be eighty-five cents (85¢) per dozen, Net Cash, f. b. o. San Francisco, Cal.

PRICE of the "Polar King" brand to be twenty cents (20¢) per dozen less than the North Alaska Salmon Company's price, in car lots, of No. 1 Red Alaska Salmon, f. o. b. San Francisco, Cal., Net, without the cash discount, when delivered.

Delivery is to be made within thirty days after arrival of vessels from Alaska and goods to be paid

for on presentation of warehouse receipt or delivery documents.

"Archer" brand of salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any natures will be allowed.

Sellers guarantee "Polar King" brand against swells and rusty tins but otherwise goods to be taken "as is," and no claim of whatever nature is to be made against seller after delivery.

Buyers have privilege of inspecting salmon before taking delivery. Sellers guaranteeing goods to be equal to the 1911 pack.

The salmon under this contract is sold subject to being packed and safely landed in San Francisco.

It is understood that the "Polar King" label is the property of the buyer and solely under their control. But if for any [15] reason whatsoever the buyer does not take delivery of this purchase within thirty (30) days after arrival, as above specified, then the sellers may dispose of the same as they see fit. If disposed of at a price which is less than that named in this contract, buyer to reimburse seller for the difference.

NORTH ALASKA SALMON COMPANY,
J. P. HALLER,
Manager.

AMERICAN TRADING COMPANY (PACIFIC COAST),
C. R. MORSE, Secretary,

A. B. FIELD,
Witness.

Service and receipt of a copy of the within Amended Complaint is hereby admitted this 18th day of February, 1916.

WISE & O'CONNOR,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 18, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[16]**

In the District Court of the United States, Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Demurrer to Second Amended Complaint.

Now comes the defendant above named and demurs to the second amended complaint of plaintiff, designated as the amended complaint, and for cause of demurrer, specified as follows:

(1) That said complaint does not state facts sufficient to constitute a cause of action.

(2) That the first count of said complaint does not state facts sufficient to constitute a cause of action.

(3) That the first count of said complaint is uncertain in this, that it does not appear therein, nor

can it be ascertained therefrom:

(a) How or in what manner defendant became indebted to plaintiff as alleged in paragraph II of said complaint.

(b) For what purpose defendant had or received money for the use of plaintiff.

(4) That the first count of said complaint is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(5) That the first count of said complaint is unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(6) That the second count of said complaint does not state facts sufficient to constitute a cause of action. [17]

(7) That the second count of said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

(a) Whether the understanding and agreement referred to in paragraph II of said second count of said complaint was in writing, and if so, what consideration, if any, there was for such agreement.

(b) Whether or not defendant ever refused plaintiff the opportunity of inspecting any of the five thousand cases of Archer Brand salmon referred to in said second count of said complaint.

(c) What, if any, damage plaintiff has suffered by reason of any breach of any warranty by defendant.

(8) That the said second count of said complaint

is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(9) That the said second count of said complaint is unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(10) That two causes of action are improperly joined in said second count, to wit, an alleged cause of action for the breach of a warranty and an alleged cause of action for the rescission and cancellation of a contract, on the ground of failure of consideration.

(11) That the third count of said complaint does not state facts sufficient to constitute a cause of action.

(12) That the third count of said complaint does not state facts sufficient to constitute a cause of action.

(13) That the said third count of said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

(a) How or in what manner plaintiff has been damaged in the sum of $17,404.21 by reason of the alleged breach of contract referred [18] to in paragraph VIII of said third count of said complaint.

(b) Whether or not the salmon of the 1912 pack referred to in said third count was equal in quality to the salmon of the 1911 pack.

(14) That said third count of said complaint is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(15) That said third count of said complaint is

unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(16) That several causes of action have been improperly united in said third count of said complaint, to wit, an alleged cause of action for damages for breach of contract and an alleged cause of action for fraud in the execution of the contract referred to in said third count of said complaint and an alleged cause of action for fraud in misrepresenting the fact that samples submitted by defendant to plaintiff were taken from the 1912 pack of salmon contracted for by plaintiff.

(17) That the fourth cause of action set forth in said complaint does not state facts sufficient to constitute a cause of action.

(18) That said fourth count of said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom:

(a) How or in what manner plaintiff has been damaged as alleged in paragraph VIII of said fourth count of said complaint in the sum of $17,404.21.

(b) Whether or not plaintiff ever rescinded the contract referred to in said fourth count of said complaint, upon ascertaining the fraud alleged in paragraph V thereof.

(c) Whether or not the custom referred to in paragraph IV of said fourth count of said complaint is claimed by plaintiff to be a part of the contract between plaintiff and defendant set up [19] in said fourth count.

(d) For what reason defendant is estopped from asserting or maintaining that inspection of said Archer Brand was required of plaintiff.

(19) That said fourth count of said complaint is ambiguous in the particulars in which it is hereinabove alleged to be uncertain.

(20) That said fourth count of said complaint is unintelligible in the particulars in which it is hereinabove alleged to be uncertain.

(21) That said complaint and each and every count thereof is barred by section 337 and section 339, subdivision 1, of the Code of Civil Procedure of the State of California.

WHEREFORE, defendant prays to be hence dismissed, with its costs of suit in this behalf incurred.

WISE & O'CONNOR,
Attorneys for Defendant.

Receipt of a copy of the within demurrer admitted this 20th day of March, 1916.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 20, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the March term, A. D. 1916, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 1st day of May, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,744.

AMERICAN TRADING COMPANY

vs.

NORTH ALASKA SALMON COMPANY.

(Order Overruling Demurrer in Part and Sustaining Demurrer in Part.)

Defendant's demurrer to the amended complaint (entitled defendant's "demurrer to second amended complaint") heretofore heard and submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said demurrer be and the same is hereby sustained as to the 1st and 3d counts, and overruled as to the 2d and 4th counts, of said amended complaint. **[21]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

(Answer to Second Amended Complaint.)

Now comes the defendant above named and answering the second amended complaint of plaintiff in the above-entitled action filed February 18, 1916, and designated as "Amended Complaint," admits, denies and alleges as follows:

(1) Admits that on the 16th day of November, 1911, the parties hereto entered into a certain written contract attached to and made a part of said second amended complaint and marked Exhibit "A" therein.

(2) Denies that as a part of said contract, or otherwise, or at all, it was understood or agreed by plaintiff and defendant that said Archer Brand salmon referred to in said Exhibit "A" would be merchantable, edible or suitable for human consumption or of the condition or quality that would entitle it by law to be brought into the said city and

county of San Francisco, State of California, or thereafter sold, and in this behalf, alleges that there was no understanding or agreement with reference to said Archer Brand salmon or any of the merchandise referred to in said Exhibit "A" attached to said second amended complaint, except such written representations and agreements as were contained in said Exhibit "A."

(3) That plaintiff inspected and examined the said Archer Brand salmon delivered to it by defendant on or about [22] the 18th day of October, 1912, and prior to the said date of delivery of said Archer Brand salmon, defendant submitted to plaintiff samples of said shipment, which said samples were taken from said shipment and were selected promiscuously from various cases of said Archer Brand salmon contained in said shipment. Defendant made no representations respecting said samples; that said samples were delivered to plaintiff at its request and suggestion and not pursuant to any understanding or agreement or custom of the trade, but only as a convenience and accommodation to said plaintiff and not by reason of any obligation on the part of defendant, and in this behalf, defendant alleges that it made no representations to plaintiff as to the condition or quality of the salmon contained in said samples.

(4) Denies that at any time, or at all, defendant represented to plaintiff that the said Archer Brand salmon was merchantable, edible, fit for human consumption or of the condition or quality that entitled it by law to be brought into the city and county of

San Francisco, State of California, and thereafter sold, or that defendant made any representations as to the condition or quality of said salmon, or any representations with reference to said salmon at any time, or at all.

Denies that defendant represented to plaintiff that the samples submitted to it in the manner above described were true samples of the kind or character or condition of said Archer Brand salmon, or that defendant made any representations with reference to said samples delivered by it to plaintiff.

(5) Denies that it was impossible to determine, without opening each tin of salmon contained in said shipment of Archer Brand salmon, whether the same was edible or fit for human consumption or merchantable or edible or tainted or putrid or sour or decomposed or rotten, and in this behalf, alleges that it is customary in inspecting a shipment of salmon to select tins from [23] various cases of the shipment and to judge the entire shipment by the samples thus inspected. That if no such samples are selected from a large number of cases of such shipment, an inspection of such samples will accurately determine the character of the entire shipment. That plaintiff could, by examining samples of said Archer Brand salmon, have determined accurately and correctly the exact quality and condition of said salmon. In this behalf, defendant alleges that for a great many years prior to the year 1912, plaintiff and defendant had entered into contracts for the purchase and sale of canned salmon similar to that attached to said second amended

complaint and marked Exhibit "A" therein, and that under said contracts, and each of them, plaintiff was able to and did accurately and correctly determine the exact quality of the salmon contained in said shipments, and each of said shipments, by inspecting cans thereof taken promiscuously from various cases of said shipments. That defendant is informed and believes and therefore alleges that plaintiff did not make such an examination of said shipment of Archer Brand salmon, and in this behalf defendant alleges, that plaintiff was not precluded, nor denied an opportunity to make such inspection and examination, nor was plaintiff induced not to make an examination by any act or statement of this defendant.

(6) Denies that the expressions contained in said contract marked Exhibit "A," attached to and made a part of said second amended complaint, to wit, "Archer Brand of Salmon to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any natures will be allowed," and "buyers have privilege of inspecting salmon before taking delivery," were understood by both parties, or either party, or particularly this defendant, to mean that after defendant had removed from said salmon all swells and rusty tins whose presence could be determined by an outward inspection thereof, plaintiff was to be given an opportunity of inspecting said salmon [24] to determine whether all of said swells or rusty tins had been so removed, and that

thereafter no reclamation was to be allowed to plaintiff for cans of salmon which were or should thereafter become or develop swells or whose tins were rusty or should develop rust, and in this behalf alleges that said portions of said contract hereinabove specifically set forth were not understood by the parties thereto or by this defendant to have any other meaning than the ordinary meaning to be given thereto, to wit, that after the said shipment had been overhauled and all swells and rusty tins taken therefrom, that no reclamations of any nature were to be allowed; in other words, that this defendant did not warrant the condition or quality of said Archer Brand salmon, or any portion thereof, further than to remove all swells and rusty tins upon the arrival of said shipment in San Francisco.

That this defendant did overhaul said Archer Brand salmon on its arrival in San Francisco, and did remove therefrom all swells and rusty tins, and this defendant did give and afford to plaintiff an opportunity of inspecting the said salmon before delivering the same to plaintiff, and defendant has performed all the terms, covenants and conditions of said contract marked Exhibit "A" and attached to said second amended complaint, on its part to be performed.

(7) Admits that plaintiff paid the sum of $16,961.30 in the manner described in said second amended complaint, the same being the entire purchase price of said salmon, but denies that said payment was made in reliance upon any representations or warranties made to it by defendant or in ignorance

of the actual quality or condition of said salmon, or that plaintiff was induced to make said payments by reason of any fraud or misrepresentations on the part of this defendant.

(8) Denies that the said Archer Brand salmon was at any time, or at all, or that any portion of it was at any time, or at all, **[25]** unmarketable, inedible or unfit for human consumption, or was putrid, tainted, rotten, sour or decomposed or was adulterated, within the meaning of the Pure Food and Drug Act of Congress, approved June 30, 1906, or within the meaning of the act of the Legislature of the State of California, entitled "An Act for preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded foods and liquors and regulating the traffic therein, providing penalties, establishing a state laboratory for foods, liquors and drugs and making an appropriation therefor," approved March 11, 1907, or that defendant in any way or in any manner connected with the shipment or delivery of said Archer Brand salmon, or any portion thereof, acted in violation of the said acts hereinabove referred to, or either of them, and in this behalf defendant further alleges that said shipment of said Archer Brand salmon was in all respects legal and in compliance with the laws of the United States, and of the State of California, and that said salmon was of the quality and condition as warranted in said agreement of November 16, 1911, herein-above referred to as Exhibit "A" attached to said second amended complaint, to wit, that said Archer Brand salmon was equal to the 1911

pack of said Archer Brand salmon in all respects and particulars.

(9) Denies that the consideration for the payment of said sum of $16,961.30 as aforesaid was or is the delivery to plaintiff of five thousand cases of Archer Brand salmon, do-over grade of Red Alaska salmon in an edible condition or suitable for human consumption or as a legitimate article of commerce and in this behalf, alleges that the consideration therefor was that expressed in said agreement marked Exhibit "A" and attached to said second amended complaint, and that there was no other consideration for the payment of said sum of $16,961.30 as aforesaid.

(10) That the only knowledge which defendant had of the condition or quality of said Archer Brand salmon was and is that **[26]** said salmon was at the time of its shipment and at the time of its delivery to plaintiff equal in all respects to the 1911 pack of said Archer Brand salmon, and that said Archer Brand salmon is an inferior grade of salmon, known as do-over salmon, and that this fact was known and understood by plaintiff at the time of the execution of said Exhibit "A" attached to said second amended complaint and at the time of the delivery of said salmon. That in all shipments of do-over grade of Red Alaska salmon, it is customary to find a certain percentage of bad salmon, and this fact was known to plaintiff at the time it entered into said contract, and for that reason defendant alleges that it refused to warrant said Archer Brand salmon, but that said shipment delivered to plaintiff

on or about the 18th day of October, 1912, was in all respects equal to the 1911 pack of said Archer Brand salmon.

Further answering said second amended complaint and particularly answering that portion thereof entitled "further, separate and fourth cause of action," defendant admits, denies and alleges as follows:

(1) Admits the execution of the contract referred to on page 13 of said second amended complaint and admits that the same was executed subject to all the terms, conditions and agreements therein expressed and contained, but denies that said contract was subject to any other terms, conditions or agreements, other than those contained in said agreement which is set forth in said second amended complaint and marked Exhibit "A" therein. That the only warranty of condition or quality of said Archer Brand salmon contained in said written agreement between plaintiff and defendant executed on the 16th day of November, 1911, was that defendant warranted that said goods were equal to the 1911 pack of said Archer Brand salmon. That said warranty was in all respects true and correct. That it was further provided in said agreement that no reclamation of any nature would be allowed after the said **[27]** "Archer Brand salmon" was overhauled in San Francisco. That this provision of the said agreement referred to the warranty that said salmon would be equal to the 1911 pack. That no claim for reclamation was made by plaintiff prior to the time referred to in said agreement within which claims

for reclamation should be made. That plaintiff accepted said shipment after inspecting the same and that plaintiff at all times knew the quality and condition of the salmon contained in said shipment. That plaintiff examined and inspected said salmon before accepting delivery thereof and that the samples submitted to plaintiff by defendant of the said shipment were furnished at the request of plaintiff, and not otherwise, and no representations were made by defendant as to the nature or quality or condition of said samples, but that said samples were selected in the manner hereinabove described, and not otherwise, and defendant alleges that said samples aforesaid furnished by it to plaintiff were true samples of the quality and condition of the salmon contained in said shipment delivered on or about the 18th day of October, 1912.

(2) Denies that at any time, or at all, it was or is the custom prevailing in the trade of canned salmon for the seller to furnish to the purchaser thereof samples of the salmon so bought or sold, or that there is any custom in the canned salmon industry with reference to furnishing samples of canned salmon, but, on the contrary, the sale of canned salmon depends entirely upon the terms of the respective contracts by which salmon is sold. Defendant admits that it furnished samples of Archer Brand salmon of the 1912 pack to plaintiff and admits that it furnished samples of said Archer Brand salmon in previous years to said plaintiff, but in this behalf alleges that said samples were furnished to plaintiff at its request, and not pursuant to any understanding

or agreement or custom of the trade, but only as a convenience and accommodation to said plaintiff, and not by reason of any obligation on the part of the defendant. **[28]**

(3) Denies that defendant represented to plaintiff that the samples of salmon furnished by it to plaintiff were true samples of the quality or character or condition of said Archer Brand salmon mentioned in said Exhibit "A" attached to and made a part of said second amended complaint, and in this behalf alleges that the defendant delivered said samples to plaintiff solely at its request and made no representations as to the quality of said salmon, but that said samples were selected from the shipment of Archer Brand salmon sold to plaintiff under said agreement marked Exhibit "A" and attached to said second amended complaint.

(4) Denies that defendant ever represented to plaintiff that the said salmon sold to it under said contract marked Exhibit "A" and attached to said second amended complaint was the best lot of said Archer Brand do-over salmon the defendant had ever packed, or that defendant made any representations to plaintiff as to the quality or condition of said salmon, other than contained in said written contract marked Exhibit "A" and attached to said second amended complaint.

(5) Denies that defendant suppressed any information with reference to said Archer Brand salmon from plaintiff or that plaintiff was induced by any act or omission of defendant to pay the purchase

price of said Archer Brand salmon provided for in said contract marked "A" and attached to said second amended complaint, but on the contrary defendant alleges that the purchase price of said salmon was paid to defendant by plaintiff with full knowledge of all the facts and circumstances with reference to the condition and quality of said salmon and in pursuance of the said contract attached to said second amended complaint and marked Exhibit "A" therein.

(6) Defendant denies that by reason of any act or omission on its part, or by reason of any false representations or any representations made by it to plaintiff, or for any reason, or at all, it should be estopped from asserting or maintaining that inspection [29] of said Archer Brand salmon referred to in said Exhibit "A" attached to said second amended complaint was required of plaintiff by said contract or that no recovery for a breach of said contract can be had by plaintiff by reason of its failure to make said inspection, and denies that by reason of any fact whatever, defendant is estopped from asserting any defense which it may have to this action or from submitting to this court all of the facts in connection with this action.

(7) Denies that for any reason, or at all, plaintiff has been damaged in the sum of $17,404.21, or any other sum, or at all, or that defendant is indebted to plaintiff in any sum whatever.

(8) That said second amended complaint, and each count thereof, is barred by subdivision 1 of sec-

tion 337 of the Code of Civil Procedure of the State of California and by subdivision 4 of section 338 of the said Code of Civil Procedure.

WHEREFORE, defendant prays to be hence dismissed, with its costs of suit in this behalf incurred.

WISE & O'CONNOR,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

R. E. Cotter, being first duly sworn, deposes and says, that he is an officer, to wit, secretary of the defendant in the above-entitled action; that he has read the above and foregoing answer to the second amended complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and that as to those matters he believes it to be true.

R. E. COTTER.

Subscribed and sworn to before me this 17th day of June, 1916.

[Seal] JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California. [30]

Due service and receipt of a copy of the within answer admitted this 17th day of June, 1916.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 19, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of one dollar.

H. E. LONG,
Foreman.

[Endorsed]: Filed October 11, 1916. Walter B. Maling, Clerk. [32]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause having come on regularly for trial upon the 26th day of September, 1916, being a day in the July, 1916, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein; Samuel Knight and F. E. Boland, Esqrs., appearing as attorneys for plaintiff and Otto Irving Wise, Esq., appearing as attorney for defendant; and the trial having been proceeded with on the 27th and 29th days of September and on the 5th, 6th, 10th and 11th days of October, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of one dollar. H. E. Long, Foreman,"— and the Court having ordered that judgment be entered in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that American Trading Company (Pacific Coast), a corporation, plaintiff, do have and recover of and from North Alaska Salmon Company, a corporation, [33] defendant, the sum of one ($1.00) dollar.

Judgment entered October 11, 1916.

WALTER B. MALING,
Clerk.

A true copy. Attest:
[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed Oct. 11, 1916. Walter B. Maling, Clerk. [34]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

(Bill of Exceptions.)

BE IT REMEMBERED that the above-entitled action came on regularly for trial before the Court, sitting with a jury, on the 26th, 27th and 28th days of September and the 5th, 6th, 10th and 11th days of October, 1916, Honorable W. C. VAN FLEET, United States District Judge, Presiding; Samuel Knight, Esq., and F. E. Boland, Esq., appearing as attorneys for the plaintiff, and Otto Irving Wise, Esq., and Richart S. Goldman, Esq., appearing as attorneys for the defendant.

The jury having been duly empaneled and sworn, the following proceedings were had and testimony and evidence introduced, objections and rulings made, and exceptions taken and allowed.

Thereupon Mr. Knight, on behalf of plaintiff, stated to the jury: In 1911 a contract was made between the parties, a copy of which I have in my hand, and which contract is admitted by the pleadings, providing for the purchase by the [35] plaintiff from the defendant of 5,000 cases of Archer Brand of salmon. Archer Brand is do-over grade of Red Alaska Salmon, labeled "Archer," being a brand which has been packed for a number of years by the North Alaska Salmon Co. to sell to the American Trading Company. The pack was the pack to be put up in the summer of 1912. The contract was dated November 6, 1911. The do-over salmon, we will show you, gentlemen, is a salmon that is re-processed, that is, it is a salmon that in the original cooking a leak is discovered in the can, and if that salmon is re-cooked within a certain length of time, which the witnesses will tell you ranges from 24 hours to 36, the salmon is a perfectly edible salmon.

The contract further provided that the Archer brand of salmon was to be overhauled in San Francisco by sellers and all swells and rusty tins to be taken therefrom, after which no reclamation of any nature would be allowed. The buyers have the privilege of inspecting salmon before taking delivery; sellers guaranteeing goods to be equal to the 1911 pack.

The salmon arrived here in the fall of 1912, the

end of the packing season, in October, 1912; the evidence will show that the plaintiff was notified that the salmon was ready for delivery. Before delivery, however, the plaintiff obtained, upon its request, samples. We will show you that it was always customary to buy salmon on samples, and obtaining these samples the plaintiff cut them and found them good, and at the same time and prior to taking delivery, the representative of the plaintiff who attended to this transaction entirely, who was A. B. Field, had a talk with Mr. Haller, the manager of the defendant, and the manager of the defendant told him it was the best lot of do-overs that they had ever put up, [36] and it was too good to be a do-over. The course of practice between the North Alaska Salmon Company and the American Trading Company had ended up to this time in the purchase by the plaintiff and sale by the defendant of a satisfactory salmon; there had been no trouble whatsoever between these companies for several years prior to the time of this transaction that is in controversy; so the plaintiff, relying upon the representations that were made by the defendant, and relying upon the samples that it had received, and believing it was protected by the federal and state Pure Food Acts, and in view of the fact that its course of dealings with defendant had been satisfactory therefore accepted the salmon without examining it, and instructed the defendant where to send the salmon which had already been sold by the plaintiff and where the orders were to be filled from this particular lot; at the same time the plaintiff

paid to the defendant the sum of money represented, approximateley $17,000—$16,961.30.

We will show you, gentleman, that it was impossible to make an examination of a tin of salmon unless you opened it; that is, you cannot, looking at a tin of salmon, see whether it is good or not in most cases. When it has what they call a swell, that is a tin that has become bulged by reason of the formation of gases in the salmon, where apparently there has been either salmon impure and filthy at the time it was originally cooked, or else because of leaks in the can, and not large enough to enable those gases to escape, the can would become somewhat out of shape, and that would indicate that there was putrefaction going on inside of the tin; but in many instances, as we shall show you, the tin in most instances containing this putrified stuff, could not be detected from [37] the outside, and it was not until they were opened that the character of their contents would become known. As the result of this stuff going out, the American Trading Company has made attempts to make reclamation on the defendant for the amount of money at any rate which it paid for this salmon, $16,961.30, and we trust, gentlemen, that when we shall have shown you these facts which I have only sketched in outline, that your verdict will be for the plaintiff for this amount, with interest from the time that we made these payments in November, 1912.

Testimony of A. B. Field, for Plaintiff.

A. B. FIELD, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am and have been for over six years manager of the canned goods department of the American Trading Company; A. B. Field & Company is a department of the American Trading Company, and I am the A. B. Field of that company. I have been engaged in the canned salmon business for over thirty years, and the character of plaintiff's business with reference to canned salmon is and was trading, buying and selling in all markets. I know the North Alaska Salmon Company; it has been engaged in packing Alaska salmon over ten years to my knowledge. The plaintiff had business relations with defendant over several years prior to 1912, and every year during that time plaintiff purchased, among other brands, salmon from defendant known as Archer Brand. This course of business existed over six years prior to 1912. Archer Brand of salmon is known on the market as a do-over or second. A second is the same as a do-over and Archer Brand is composed exclusively [38] of do-over or second salmon. A do-over or second is a salmon that has been re-processed; that is, a salmon that is canned twice.

Q. Can you state, Mr. Field, what you mean by being cooked twice, as far as your knowledge of the salmon industry is concerned?

A. After the first cooking, a certain number of cans are found defective.

(Testimony of A. B. Field.)

The COURT.—By defective you mean from having air holes?

A. Yes, from having air holes in them; some defect of the can itself, probably.

Q. Or imperfect soldering?

A. Imperfect soldering or something.

Mr. KNIGHT.—Q. Then that salmon is put back into the retorts is it, and cooked again? A. Yes.

The COURT.—What is the re-processing?

A. The fish is cooked and then soldered.

Q. Is it cooked to expel the air?

A. Yes, and then soldered.

Mr. KNIGHT.—Q. As I understand it, it is opened, tapped, the air is extracted and then soldered? A. Yes.

Q. Of course you are now speaking of the old style can? A. Entirely so.

Prior to 1912 the defendant packed in what was called old style cans; since then they have used the sanitary can; and for several years prior to 1912 Archer Brand of do-over salmon has been bought and sold commonly in the market [39] as edible for consumption. I know of houses that have dealt in it in large quantities. The salmon for those few years was entirely satisfactory. The contract in suit refers to swells. A swell is a defective can with gas in it and is noticeable from an exterior inspection. The presence of that gas is attributable to the commencement of decomposition. A rusty tin means presence of rust on the exterior, which would eat away the can and impair its salability, if con-

(Testimony of A. B. Field.)

tinued long enough. In the course of business I received the following letter:

Thereupon was introduced and read in evidence Plaintiff's Exhibit 1, as follows:

Plaintiff's Exhibit No. 1—Letter, October 18, 1912, North Alaska Salmon Co. to American Trading Co.

San Francisco, Oct. 18, 1912.

American Trading Company,
244 California Street,
San Francisco, Cal.

Gentlemen:

You are advised that the following salmon is now in Mission Rock warehouse:

5000 cases "Archer" Salmon.
1300 cases "Polar King" Salmon.

We trust that you will give us shipping instructions for same in the very near future.

Yours truly,
NORTH ALASKA SALMON COMPANY.
J. P. HALLER,
Manager.

Very shortly after the receipt of the letter of October 18, 1912, I had a conversation with Mr. Haller at the office of the North Alaska Salmon Company respecting this pack; Mr. Haller and myself only were present.

Q. What was that conversation?

Mr. WISE.—If your Honor please, that is objected to upon the ground that it is immaterial, irrelevant and incompetent, that it is not within the

(Testimony of A. B. Field.)

issues, that it seeks to explain a written instrument which is already before the Court.

The COURT.—What is the purpose of it?

Mr. KNIGHT.—The purpose of it is to show the representations which were made which are set out in the complaint, the furnishing of the samples, the representations made by Mr. Haller concerning the condition of these goods, as to what they were, what the plaintiff could rely upon, as the reason why there was no actual inspection made of them. That is all set out in the complaint in the two counts, one as bearing on [40] the question of estoppel and one as bearing on the question of the right of the plaintiff to recover the purchase price under the circumstances.

The COURT.—I will let the evidence go in.

A. I asked for samples to be sent to my office as usual of this canned salmon both Polar King and Archer Brand.

Q. Were samples afterwards of each of these cans of salmon sent to you? A. Yes.

Q. Was anything further said in that conversation which you had, where you have given us the substance of that conversation?

A. He said he found the quality superior to anything.

Q. I ask you: Did anything further occur in that conversation between yourself and Mr. Haller than the request for samples? A. Yes.

Q. State what further occurred; what was the further conversation?

(Testimony of A. B. Field.)

A. He made the statement that the quality of the Archer Brand and the Polar King were superior to anything he had ever packed, or ever presented to us, and that we should obtain full prices for the same.

Mr. KNIGHT.—Q. Mr. Field, was there anything further said with respect to the quality of these salmon of the 1912 pack other than what you have said?

A. Not to my knowledge; not that I remember.

The American Trading Company handled the 1911 pack of Archer Brand salmon purchased from the North Alaska Salmon Company. We received the samples of this 1912 pack, first [41] an entire case, 4 dozen cans. We afterward got other samples, not less than two cases. I made an examination of those samples prior to the time the salmon was paid for. I opened not less than a dozen tins; the condition of the contents was very satisfactory and perfectly edible. Some of these samples furnished by the North Alaska Salmon Company were sent east by the American Trading Company to eastern brokers. I don't know who selected the samples that were sent by plaintiff. They were not selected by it. No one but myself conducted any negotiations or had any part in this transaction on plaintiff's behalf. When I spoke of the defendant furnishing samples as usual, I meant as they had in previous years, the salmon in previous years. They always furnished samples in buying this salmon. No inspection was made by plaintiff of the bulk of this salmon as distinguished from the samples prior to the time of delivery. I made no investigation of the

(Testimony of A. B. Field.)

condition of the salmon before taking delivery and paying for it other than the investigation I made from the samples that were furnished and other than the information that was given to me by Mr. Haller. I would not have taken the salmon if the samples had proved to be in whole or in part inedible, or if Mr. Haller had not made the representations that he did respecting its condition.

The condition of canned salmon cannot ordinarily be ascertained from the external appearance of the can, other than is shown by swelling or other like defect, and it is necessary to open the can in order to know the condition of its contents. They are hermetically sealed. Delivery of the Archer Brand salmon was taken by the American Trading Company [42] from the North Alaska Salmon Company very shortly after November 4, 1912.

I sent the following letter on plaintiff's behalf to defendant November 4, 1912:

Thereupon was introduced in evidence Plaintiff's Exhibit 2, as follows:

Plaintiff's Exhibit No. 2—Letter, November 4, 1912, American Trading Co. to North Alaska Salmon Co.

Nov. 4, 1912.

North Alaska Salmon Co.,
#110 Market Street,
San Francisco, Calif.

Gentlemen:

Referring to our Contracts for ARCHER Salmon. Please overhaul very carefully; remove all swells;

(Testimony of A. B. Field.)

shipping 1000 cases by Santa Fe in the name of A. B. Field & Co. to their order, St. Louis, Mo., marking same: Diamond M St. Louis; Ship 900 cases by Santa Fe, C. M. & St. P. Delivery Chicago; Ship in our name to order, notify ourselves; mark the same Diamond F Chicago. We must ask you to be extremely careful in removing all swells as there has been great difficulty in moving this Salmon this year.

Now we are negotiating for sale of further quantities which we hope to hand you shipping instructions by the time you have shipped out the above.

Very truly yours,

AMERICAN TRADING CO.

(PACIFIC COAST.)

WITNESS.—(Continuing.) I sent the samples of this salmon that were furnished by the defendant to eastern places, at least a dozen cans to Louisville, to Fulton Gordon, the leading merchandise broker of that city, and at least a dozen to Walter A. Frost & Company, Chicago, a leading merchandise broker of that city. Of the salmon delivered by defendant plaintiff shipped and sold 900 cases to Walter A. Frost & Company, of Chicago, 1,000 cases to the Merchants National Grocery Company of St. Louis, 1,000 cases to the Louisville Grocery Company, of Louisville, Kentucky. The remaining 2,100 cases remained in the Mission Rock Warehouse where plaintiff took delivery of the salmon. Subsequent to the early part of November, 1912, complaints regarding the condition of the salmon were made by Eastern buyers.

(Testimony of A. B. Field.)

Mr. KNIGHT.—Q. When did you first receive those complaints; when did they first reach you?

A. The end of November and the first of December.

Q. Of what year—1912? A. Yes.

WITNESS.—(Continuing.) The first complaint was received December 3, 1912. In December, 1912, after receiving these complaints I had a conversation with Mr. Haller in the [43] office of the North Alaska Salmon Company. The substance of the conversation was to the effect that we were receiving a great many complaints from the shipment of this Archer salmon in eastern cities where we had shipped salmon. I asked Mr. Haller that we would expect him to investigate the matter very thoroughly and reimburse us for any loss that we sustained, and that these eastern buyers claimed that the deliveries were nothing like the samples sent to the buyers. Mr. Haller positively declined to consider any claim whatever.

In February or March, 1913, I examined the 2,100 cases at Mission Rock Warehouse. I first made a preliminary examination accompanied by C. R. Morse and Paul Hartman, a professional overhauler of canned salmon, opening say perhaps 50 cases and removing 50 cans selected at random. We found a great many cans the contents of which was rotten. I am able to state that something like 25% were rotten. I made a later examination with Mr. Morse and Mr. Hartman in March, 1913. We made com-

plete notes of that. These notes are dated April 30, 1913.

Mr. WISE.—Q. I understood you to say a moment ago that this second inspection made by yourself, Mr. Morse and Mr. Hartman was made in March, 1913.

A. I said about, along about that time, about that time.

The COURT.—Isn't it dated?

Mr. WISE.—This is dated, but the examination was at a different time. I observe that this document or these notes are dated April 30, 1913. With that date in your mind as appearing upon these notes, will you indicate to us how long before this date this examination was made? [44]

A. I would say in the neighborhood of two months. We were a long time doing it. It took a great deal of time. On this examination we opened 417 tins. The result showed over 30 per cent contained rotten fish. We avoided swells and rusty tins. The 2,100 cases in the warehouse here were destroyed by the Government. That was the subject of the condemnation suit in this court entitled United States vs. 2,100 Cases of Canned Salmon. Plaintiff had done nothing with it on account of its rotten condition. We did not attempt to put it on the market or offer it for sale. We didn't consider it merchantable. Salmon properly processed will keep indefinitely. I have known cans of salmon seven years old to be cut open and in perfect condition; as long as the air is kept from the contents it will keep indefinitely. That is true of do-over properly prepared. There

(Testimony of A. B. Field.)

is no difference in this between a do-over and prime salmon.

The COURT.—Q. Mr. Field, what is the distinction, then, in the trade, that induces the price for so-called do-over salmon to be less on the market than prime salmon, that is, I mean that which—

Mr. WISE.—They call it standard or No. 1, I think.

The COURT.—Standard or No. 1.

A. There is a possibility that it might not be altogether properly canned and at times it will blow off.

Q. That is always subject to be discovered from external appearance if it generates gas?

A. It may be a defect in the can, weakness or rust.

Q. What I want to get at is, does it not make some difference in that grade of salmon, as between that and No. 1 or standard, as to the time within which it should be put on the market and [45] consumed?

A. Not if it is properly prepared. The tin shows additional marks where it has been tampered with, and it is placed as a second grade; it shows punctures.

Q. A sort of *caveat emptor* to the purchaser; he wants to look out?

A. That is the idea; it may not have that keeping property; if it is not guaranteed against swell, a man has to buy it for a less price, so as to be prepared for that if necessary.

Q. It is recognized as being subject to being found with swells. A. Later on.

(In response to question by a juror.) In 1912

(Testimony of A. B. Field.)

standard Alaska Reds opened at $1.40 per dozen and we sold this Archer brand for $1.00.

Mr. KNIGHT.—Have you anything that refreshes your memory as to different kinds of salmon?

A. This is the annual notice; it is a trades paper that gives for a series of years the opening price.

Q. Will you state what those prices were for the different kinds of salmon?

The COURT.—We are only concerned with standard and with the Archer brand.

A. In 1912, Alaska Reds opened for $1.40.

Q. That is standard?

A. Yes, do-overs are not quoted here.

The COURT.—Q. What did you pay for these do-overs? A. 85¢.

Q. What would you have been called upon to pay under a similar contract for primes? [46]

A. $1.40 less commission.

Q. What is that commission?

A. $1.40 less brokerage and so forth.

Q. I am asking what it would net you?

A. $1.40 less 2½ per cent.

Q. They would not have contract for less than $1.40 less 2½ per cent? A. Not in advance.

Q. We are trying to ascertain what the difference is between the standards and do-overs.

A. This particular year, 1912, the standard was $1.40 less commission; we will say that it was $1.35 taking the commission off because we pay the net price; we paid 85¢ in advance that year, and that was

(Testimony of A. B. Field.)

a matter of speculation, making a fixed price the year before.

Q. You do contract ahead for standards?

A. But subject to an opening price it shall not be over so much.

WITNESS.—(Continuing.) Now, for instance, this year we anticipate an opening price of about $1.40 to open at $1.50; it is now at $1.60. It all depends entirely on what the pack may be. In November, when that contract was made, it was all guess work all round, so to speak, entirely a gamble what the price would be; in other words, it was a speculative purchase.

Q. Assuming that you had included in this contract 5,000 cases of standard or prime Reds, what would you have had to pay for them under the contract, as compared with 85 cents a dozen for the do-overs?

A. $1.50, in comparison; the price that year opened lower than [47] we anticipated, for the reason that there was a very large pack that year. In 1912 the pack was over one million cases in excess of what had ever been packed. The 1912 pack was the largest we ever had.

Q. Mr. Field, what was the market value of the do-overs in 1912, at the time of the delivery of this lot of merchandise, if it had conformed to the pack of 1911 do-overs in condition, as a matter of condition, that is, if it was fit for consumption?

Mr. WISE.—That is objected to, if your Honor

(Testimony of A. B. Field.)

please, as immaterial, irrelevant and incompetent.

Mr. KNIGHT.—We have asked in our fourth count for damages arising from an estoppel of the defendant to assert that we did not inspect them; we have a statement of damage in our fourth count. We have alleged that we have been damaged in the sum of $17,000. That was one thing that counsel was complaining about. We ask for damages in the fourth count and ask for the return of the specific sum of money that we paid, in our second count. If the jury should find, for instance, that there has been a breach here of the contract in the respect that we have set out in our complaint, that is, that it did not conform to the 1911 pack, and we were entitled to a salmon that did, then I take it that the court could instruct the jury that they could find according to the evidence as to the difference between the market value of the stuff that should have been delivered at the time of its delivery and the value of the merchandise that actually was delivered under the contract.

A. $1 per dozen.

Q. Mr. Field, what was the value at the time of the delivery of this Archer brand of salmon, in 1912? [48]

Mr. KNIGHT.—Q. Did the salmon that was delivered to you in 1912, Archer Brand Salmon, in view of the condition in which it was discovered, have any market value at all? A. No value.

Cross-examination.

There are different grades of Alaska salmon;

(Testimony of A. B. Field.)

Alaska Reds, Alaska King and Alaska Cohos. Alaska do-overs are in the class of Cohos or medium red, as to value.

Q. Now, as a matter of fact, Mr. Field, the label does not indicate the grade or quality of the salmon?

A. It should.

Q. I ask you whether it does, as a matter of fact?

A. It does in the matter of the Archer Brand; yes.

Q. A label is the personal property of the trader or dealer in canned salmon, isn't it?

A. At times; yes.

Q. A salmon of a given general quality, packed for a trader, is pasked with such label as the trader uses or owns? A. Yes, sir.

Q. For example, in the controversy here there is some reference made to Polar King. That is another brand of salmon? A. Yes.

WITNESS.—(Continuing.) We agreed to pay 85¢ for these do-over salmon per dozen according to the opening price. The best grade of salmon from Alaska, red salmon, opened at $1.40 per dozen in 1912. The same salmon is used in do-over cans as is used in the best grade of salmon.

Mr. WISE.—The packer seeks to put up first grade salmon all the way through?

A. Yes. [49]

Q. Now, in the process of putting it up, if a tin should be defective, or if there should be gas generated in a tin, that tin is set aside and it is reprocessed at the cannery? A. Yes.

The COURT.—Right there, Mr. Field, it might

(Testimony of A. B. Field.)

result and doubtless does result frequently in the processing of fish, that the same fish has been divided up into six or a dozen cans and a part of these cans may have to be done over and the other be prime.

A. That is true.

Q. Therefore, the only defect is the defect of tinning it or canning it? A. The processing; yes.

Q. If there is a leak, for example, in a can, and that leak is soldered, that can is called a do-over, isn't it? A. Yes.

Q. Or if there is air in a can and that is discovered at the time of the processing, that can is opened, or a hole bored into it, the gas or air is permitted to escape, and that is called a do-over?

A. After it is re-processed and retorted.

Q. Other than the defect in the can, or in the canning of the best grade of fish, there is no difference, then, between the commodity itself, the best grade of the commodity, and the do-over grade?

A. Provided it is mended right then and there.

Q. I say except for the process of closing the tin or canning the merchandise properly, there is no difference between the best grade of salmon and the salmon which you call do-overs?

A. If it is re-processed properly. [50]

Q. I said if it is re-processed properly, if it is tinned properly, if it is mended properly.

A. Yes.

Q. There is no difference between the grades of salmon of the best class and of the do-over class?

A. That is right.

(Testimony of A. B. Field.)

WITNESS.—There is not a sufficient quantity of do-overs for market quotations.

Mr. WISE.—Is it not also due to the fact that a great number of reputable merchants and dealers refuse to have anything to do with do-over salmon?

A. Not at the dates mentioned, 1911 and 1912.

Mr. WISE.—Q. Isn't it a fact, Mr. Field, that the cannot use do-over salmon now at all, because they are not allowed to use those old cans?

A. That is the case now, yes.

Q. There is no such thing nowadays as do-over salmon, is there? A. No.

WITNESS.—In October, 1911, when we contracted for this salmon at 85¢ a dozen, the market price was $1.25 for do-overs.

Q. And in the intervening year, the market for do-over salmon had gone down, hadn't it?

A. With the rest of the market, it all went down together.

Q. That was due to the extraordinarily large pack of 1912? A. Yes.

Q. As a matter of fact, the market for canned salmon in October, November and December, 1912, was very much lower than it had been the year previous? [51] A. Yes.

Q. Now, you said something about not being able to place all the do-overs, didn't you?

A. I did.

Q. What was that due to—the depressed condition of the market?

(Testimony of A. B. Field.)

A. Not the depressed condition of Cohos, but the depressed condition of other grades of salmon which we were selling against.

Q. Did you have any trouble disposing of those in the preceding years? A. No.

Q. Due to what, due to the market condition of salmon? A. No, because the quality was good.

Q. You knew nothing about the quality of the goods, you say when you sold them?

A. 1912, we had no trouble selling them as long as the quality was good; it was a matter of quality.

Q. When did you contract for the sale of 2,900 cases of this salmon in 1912?

A. Previous to November 18th.

Q. When did you first discover, if you did at all, that the pack of 1912 was an inferior pack as to quality?

A. After receiving complaints from these eastern customers.

The COURT.—What time was that?

A. In the course of 30 days, in the natural course of events, when that salmon arrived at destination.

WITNESS.—The first shipment of this Archer Brand salmon east was made November 15, 1912. It was about the 10th of December, 1912, that I first learned of the condition of [52] the salmon that went to St. Louis.

Q. You know that Mr. Haller has been dead since the spring of 1915? A. Yes.

Q. Is there any other way of testing the quality of

(Testimony of A. B. Field.)

salmon in a can except by opening each can and looking at it? A. Not to my knowledge.

On October 18, 1912, I received plaintiff's exhibit one, advising me that 5,000 cases of Archer Brand salmon were in the Mission Rock warehouse and asking me for shipping instructions. The conversation that I had with Mr. Haller occurred some time in October.

I only remember the substance of my conversation with Mr. Haller in asking him to send samples. If I remember rightly I asked him for one case to be sent to my office; he sent one case; I received another case a couple of weeks or so later. Of the first case I probably opened a dozen cans; I do not remember exactly; I do not remember exactly what I did with it. Of the remainder I sent samples to Louisville, St. Louis and Chicago. On October 21, 1912, I sent F. Gordon, Louisville, samples of this Archer Brand salmon. On November 6, I sent Fulton Gordon, Louisville, a package of canned salmon. On November 8, I sent Walter Frost of Chicago two packages. Those are the only samples I sent to anybody during the year 1912.

Mr. KNIGHT.—Q. Were the two shipments to Louisville and the one shipment to Frost?

A. There is another one on November 29th. A sample went out to J. W. Crawford, Roanoke, Va.; I do not remember about it. [53]

Q. Did you send any others?

A. On November 1, I sent to L. K. Eck at Texarkana.

(Testimony of A. B. Field.)

Q. How long after you got the first case of samples did you get the second case?

A. I should imagine a couple of weeks or so.

Q. Who asked for that? A. I did.

Q. Those samples were for what purpose?

A. Representing the salmon that they were to give me, the Archer salmon they were to deliver me.

Q. To be used by you for the purpose of issuing samples of resale?

A. Yes, they were asked for that purpose.

Q. In other words, in your business when you called on Mr. Haller to discuss the 1912 pack and your business with him, you asked him to send some samples, so that you might send them to your different customers, in order for you to re-sell them?

A. Correct.

Q. Your business was to re-sell this salmon through jobbers?

A. We bought it on speculation.

Q. Speculation to re-sell it through different jobbers in different eastern communities? A. Yes.

Q. And these samples that you asked for were for that purpose? A. Yes.

The COURT.—Then these samples were furnished, really, from the lots that you had bought; they just sent you a case?

A. I don't know anything about that; they were represented [54] as such.

Q. You say that you told him to send you these samples to send to your customers? A. Yes.

(Testimony of A. B. Field.)

Q. And they were from the lot of salmon that you had bought? A. That was my belief, yes.

Mr. KNIGHT.—We contend that they were not; he accepted the goods as samples, but they probably were not.

Mr. WISE.—Let us get that clear. What do you mean, is your belief—what Mr. Knight just stated or what you had previously stated?

A. I believed that they represented this salmon I was to receive on this contract that I had with the North Alaska Salmon Company, that that was a representative sample.

Q. Now you say that you asked for these samples to be sent on to your customers. At whose expense were the samples thus furnished sent?

A. Pardon me. I asked for samples to be sent to my office.

Q. But you asked for them to be sent to your office for the purpose, you say, of sending them to your customers? A. At our expense.

Q. They were sent at your expense?

A. The American Trading Co.

Q. In other words, you paid for those samples?

A. The expressage; yes, there was no charge for the samples.

Q. For instance, here is what I want to get at, Mr. Field. You bought 5,000 cases? A. Yes.

Q. You contracted for 5,000 cases? A. Yes.

[55]

Q. Of do-overs? A. Yes.

Q. And you got them? A. Yes.

(Testimony of A. B. Field.)

Q. Did you get 5,002 cases? A. No.

Q. You got just 5,000, including your samples?

A. Plus two cases.

Q. That is what I am asking you, because that is very material. A. Plus two cases.

Q. Plus two cases? A. Yes.

Q. Do you know that as a fact? A. I do, yes.

The COURT.—You indicated this morning in your direct examination that do-overs can always be known from primes because they bear evidence of having been pricked or punctured.

A. Yes, as a rule they can be known.

Q. Were these samples that you received from the defendant here do-overs?

A. I did not pay any particular attention to them at that time.

Q. You have dealt with them a great many years?

A. They might have been other samples; he might have given me standard samples, for all I remember now.

Q. Mr. Field, would you want the jury to understand that you could be deceived that way by samples?

A. It might possibly have been something better.

Q. I am asking you for the fact. [56]

A. I hope not.

There was nothing to enable me to determine whether these were samples from the 1912 pack or something prior, except Mr. Haller's word, Mr. Haller's assurance, that it was the finest lot of salmon he ever packed.

(Testimony of A. B. Field.)

Q. Now, Mr. Field, being an experienced man in the trade, you could not have foisted upon you samples of a previous year for samples of the present year, could you?

A. You can't tell the difference. The man don't live that can tell it.

Q. The time that would elapse between the pack of one year and another, that time would afford an opportunity for labels to become discolored which could not occur within so short a period as one or two months; isn't that true? A. Sure.

Q. What I am trying to get at is you have no idea that these samples were not sent to you from the pack of 1912? A. No.

Mr. WISE.—Q. You say in answer to his Honor's inquiry that at that time, namely, the fall of 1912, you had no idea that the samples sent to you were other than that year's pack? A. Yes.

Q. I am asking you whether any investigation you made or whether any evidence at your command, or whether any information has been brought to you from any source whatsoever that the samples sent you at your request were other than samples of the 1912 do-over pack?

A. I have no reason to think so, no.

I stated also at that first interview Mr. Haller [57] stated do-overs were better than any he ever had. I don't remember whether Mr. Haller was in Alaska in 1912. I think his superintendents had reported to him the condition of the pack.

(Testimony of A. B. Field.)

Q. Then that had reference to the quality of salmon that was put into a tin? A. Yes.

I don't remember any letter from Mr. Haller accompanying the samples. Referring to the packages of samples which I sent east, I know of my own knowledge that none of them contained less than six nor more than twelve tins. We went back to the old system of handling samples; that was a matter of custom. We have always handled them by samples. In selling this salmon to the trade we always represent it as do-overs or seconds, never any other way. The man who purchases them from the retailer does not know they are seconds. Fulton Gordon of Louisville and Frost & Co. of Chicago were the agents of plaintiff in disposing of the salmon of the 1912 pack.

Plaintiff contracted directly with the Louisville Grocery Company on November 6, 1912 for some of this salmon. The samples from which the sale of Archer Brand Salmon was made to Louisville Grocery Company in 1912 was sent to Fulton Gordon. We also sold part of this salmon to Merchants National Wholesale Grocery Company at St. Louis through Fulton Gordon, our broker.

I have no memorandum showing sales of do-over salmon prior to 1909.

In the year 1909 plaintiff sold all of the do-over salmon purchased by it from defendant prior to November 4. [58] In 1910 all of the salmon purchased by plaintiff from defendant was disposed of by November 30. In 1911 they were all sold before they arrived; they were sold to arrive July 15, subject

(Testimony of A. B. Field.)

to safe arrival. From my records I can state that the first complaint we received in 1912 was on December 3.

I made the first examination of the salmon in the Mission Rock warehouse in the spring of 1913. After the preliminary examination was completed and we found a large percentage of the salmon decomposed, we talked the matter over in our office and then commenced a more detailed examination.

Q. During the period of time that do-over salmon was a commodity that was dealt in by your firm before the date of these so-called sanitary cans, state how many dealers, in proportion to the total number of dealers in canned salmon, refused to deal in any do-overs? A. I would not be able to state.

Q. Do you know of any who ever refused?

A. Not to my knowledge, none of them refused.

In the fall of 1911 when the contract for the purchase of the 1912 pack of Archer Brand Salmon was made, the opening price for No. 1 Red Alaska Salmon was $1.60 a dozen.

When there is a large pack of standard or No. 1 salmon, the market for do-overs drops proportionately to the quantity of No. 1 salmon.

Plaintiff dealt in the do-overs purchased from defendant upon a speculative basis. There is no fixed market quotation on do-overs. The quantity is small in comparison with the size of the pack.

That a great many dealers in canned salmon have no opportunity to traffic in do-overs. [59]

(Testimony of A. B. Field.)

At the time I made the contract for the 1912 pack of Archer Brand salmon do-overs at 85¢ a dozen, the market price for No. 1 Red. Alaska Salmon was $1.60 per dozen. The same salmon was used in both No. 1 and do-overs.

Q. If the contents of the tin are properly reprocessed and all swells and rusty tins removed, if the contents of the tins are identical and the difference is only in the fact that one tin has been properly processed and the other has not, will you please explain to the Court and the jury the real reason for this great difference in the price of these tins?

A. My purchase in 1911 of the 1912 pack was a speculative purchase.

Q. A speculative purchase based upon what?

A. What the future price may be, what the pack may be. As a rule the price which is made for future salmon is that the buyers have the privilege of accepting or rejecting the opening price.

When plaintiff purchased Polar King brand of salmon from the defendant in the fall of 1911 of the pack of 1912, a definite price was fixed for this brand.

The COURT.—Q. If No. 1 Alaska salmon and do-overs are exactly the same material and the do-overs are just as good as that which is classed as prime, why should there be such a great disparity in the price between the two.

A. The custom has made it so.

Q. But Mr. Field, custom has always some basis or reason.

(Testimony of A. B. Field.)

A. But the trade regulates what they will pay, supply and demand.

Q. That is always based upon a reason, a very good reason, and men experienced in the trade have knowledge of it? [60]

A. I can't explain it except on supply and demand.

Mr. WISE.—May we understand that that is the best answer you are able to give, to account for the disparity in the price?

A. Supply and demand, yes.

Redirect Examination.

Do-over salmon was dealt in by the largest wholesale groceries in the United States.

The original purpose of my obtaining the samples of salmon from defendant under this contract was to satisfy myself of the quality of the goods we were to receive of the 1912 pack. In 1909 we sold 5,350 cases Archer brand do-over; in 1910, 6096 cases, and in 1911, 3,000 cases Archer brand do-over salmon.

Recross-examination.

Q. What is the best grade of Red Alaska Salmon?

A. Standard.

Q. What is the next best? A. Prime.

Q. What is the next best? A. Seconds.

Q. That means a do-over? A. Yes.

Q. Polar King is not a standard, is it?

A. It is a prime.

In the contract for the purchase of Polar King salmon it is designated as No. 2 grade Red Alaska salmon.

(Testimony of A. B. Field.)

Q. What is the difference between standard and prime?

A. The prime has been recooked but not filled with salt water. [61] When a leak develops in a can during the original processing and the oil or juices leak out, the can is filled with salt water. In the case of a prime, the oil from the salmon has not leaked out of the can.

Testimony of Frank D. Merrill, for Plaintiff.

FRANK D. MERRILL, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a chemist employed in the United States Food and Drug Inspection Service in San Francisco. I have been a chemist about ten years and I have been connected with the government service since November, 1906. I examined 100 tins of salmon involved in the case of United States vs. 2,100 Cases of Archer brand salmon in July, 1913. I found 39 per cent of the tins examined to contain salmon that was unfit for human consumption. The outward condition of the tins which I examined appeared to be in good condition. I did not examine any swells. I could not tell from the outside of the tins what was the condition of the contents.

Mr. WISE.—We will concede that Mr. Merrill is a chemist of standing, that his ten years in the United States Government makes him a chemist of ability and of standing.

WITNESS.—(Continuing.) I made an organoleptic test of the salmon, i. e., by the five senses. It

(Testimony of Frank D. Merrill.)

was not submitted to any chemical analysis. It was self evident when the tins were opened what the condition of the contents was. The 39 per cent [62] of the salmon was in various stages of decomposition, some of it very putrid; and in some cases it was sour, sour smell and in others, it might be termed as very stale, a condition such that it would be unfit for food. The examination was made in July, 1913. I have examined canned foods more or less, as a part of my duty, during the entire period of my service with the Government. If food is properly canned and kept in proper condition as to temperature, it will keep for a number of years.

The COURT.—The manner in which they are kept has a great deal to do with their preservation.

A. Yes. For example, if they were in a fire or submitted to high heat of any kind they would be liable to blow up and swell in one way or another; if they became wet they might rust.

Mr. KNIGHT.—Q. Are you able to state, Mr. Merrill, how long salmon if properly cooked and canned will last if kept in an ordinary temperature and not subject to extreme heat?

A. They will keep a number of years; no particular limit of time. I think the 39 per cent of the salmon which I found inedible was in that condition at the time it was last processed. I think it was then in the same condition that it was when I opened the tins. My opinion is that the salmon was processed in the condition that it was that I found it in as to the question of decomposition. I mean that in the case of

(Testimony of Frank D. Merrill.)

the tins which were decomposed when opened, they were decomposed when they were processed, that they were processed in that condition. Decomposition does not progress after sterilization in hermetically sealed cans. That entirely stops decomposition at that point. Sterilization does not remove smell. If it is in a hermetically sealed tin the smell stays right there. The point I am trying to make is this: that if a fish [63] is rotten, or is in the process of rotting when put in the tin and the tin is sterilized, that then decomposition stops at that point, that is, your finished product is in exactly the same condition as to decomposition that it was when it was last processed. Now, of course, processing makes a difference physically in the texture. You cook that fish and there is a physical difference there, but speaking from the standpoint of decomposition, the condition as to decomposition is exactly the same after processing as it was before, because decomposition stops. The decomposition is caused by bacterial growth and they are killed by the processing, that is, if it is completely sterilized; if it is not completely sterilized and decomposition does continue, then you have got a swelled tin. I am speaking of these tins, none of which were swelled.

The examination of the salmon was made in the laboratory of the Food and Drug Inspection service in San Francisco. I first saw this salmon in the laboratory.

Cross-examination.

These samples, i. e., 4 cases of 48 tins each, were

(Testimony of Frank D. Merrill.)

brought into the laboratory and bore the name of the inspector H. C. Moore. These tins were selected from each of the four cases which were brought into the laboratory. My recollection is that no swells or rusty tins were selected. I do not know of my own knowledge where these cases came from. 100 were opened and 92 held in reserve. That can of salmon marked Plaintiff's Exhibit 3 for identification bears the same label as the sample that I examined.

(The witness refers to a can of salmon bearing the [64] label Archer Brand, marked Plaintiff's Exhibit 3 for identification.)

Testimony of H. C. Moore, for Plaintiff.

H. C. MOORE, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am and was in 1913 regularly appointed Food and Drug Inspector of the United States Department of Agriculture. I obtained samples of the canned salmon in controversy from Mission Rock warehouse bearing the identical label like Plaintiff's Exhibit 3 for identification; the samples were collected July 2, 1913. 192 cans were taken, one can of each lot in 192 cases picked at random from the pile of cases where were there, and I took them personally to my office in the Appraisers' Building where they were marked with my initials and seal. I turned them over to the laboratory and they are receipted for there and put into a locker until the examination is made. I did not take any cans which gave evidence of swells or cans which gave any out-

(Testimony of H. C. Moore.)

ward indication that their contents were not in good condition, or where rust had made any holes.

Cross-examination.

Q. Did you ever investigate the subject to ascertain what was the condition of the Archer Brand salmon seized by you when it left Alaska?

A. No. The only thing that I did was to try to find out if any one knew but so far as I myself was concerned I had no means of finding that out. [65]

A report was rendered by the chief of the Western District to the chief of the Bureau of Chemistry at Washington in which the former stated that he was unable to give any evidence that these goods were in bad condition when they were shipped from Alaska. This statement was based upon my investigation and report.

Testimony of John S. Hume, for Plaintiff.

JOHN S. HUME, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a salmon canner and have been such since 1896, actively since 1906. Have operated canneries on the Rogue River and in Alaska; I operated a cannery in Southeastern Alaska in 1912 at Nakat Inlet. A can of do-over salmon is a can that is a defective can of salmon made sound by mending and re-processing, re-cooking.

Q. You say it is a defective can of salmon. Will you state whether the defect is in the can or in the salmon itself? A. In the tin.

There are two systems in canning salmon, one

(Testimony of John S. Hume.)

where the old style cans were used, such as these in the present cases; there are two systems in the old style of canning.

A vacuum in the cans is obtained under one system by an exhaust box and under the other system by two cookings. Salmon is canned as follows: Salmon is stripped, cut up, put into the can. It is then passed through an exhaust box, [66] with the vent open in order to expel the air. It is then sealed, i. e., the vent hole is closed, and the can is put into a retort and cooked for eighty minutes. Unless some defect in the can is discovered, that completes the cooking. If a leak is discovered before the cans go into the retort, and are immediately mended, they go in with the same lot of salmon and are straight goods; but if the leaks are found after they come out of the retort, they are classed as do-overs. If the end of a can was not expanded, swelled out, when you take it out of the retort, it would denote a leak. All perfect cans are swelled out after coming out of the retort, while they are hot from the steam in the can; there is pressure on the can. Sometimes they have a hot leak tester, and he takes a mallet and hits the top of every can to see whether the can will collapse by the striking of the mallet, and if the can collapses thereby it leaks. When the can is cold the leaks are found by hitting the top of the can with an awl, by the sound.

When the cans with the swelled ends are taken from the retort, they are put in a lye bath to take the grease off and cleaned, then rinsed off in another

(Testimony of John S. Hume.)

tank, then put on the floor of the cannery in iron trays or coolers. They still have the bulging ends until they are cooled off. When they cool the end collapses. If there was not a sufficient amount of vacuum in the can it would not collapse. This is put aside and used as a do-over. Any leak is a do-over after the can has been cooked. To discover a leak the can is put in a testing tank of hot water and the can shows bubbles wherever it leaks. The point of the leak is marked with an awl. The can is then set aside with others to be re-cooked. [67] What is done depends on the amount of work that is necessary to be done in the cannery, how much fish there are on hand; if there are a great many fish the can is set aside; ordinarily if there is not much fish in the cannery the can is taken to the mender's bench and it is then re-mended and re-cooked. The expulsion of air from the can depends on the system you use; if you use the exhaust box, the can is run through the exhaust box. The vent is opened first, the leak mended and after the can is mended with the vent open, it is re-run through the exhaust box and then the hole is stopped, then re-cooked. When you have not an exhaust box, using the old style cans, it is called the two cooking process. In this process the salmon is first cooked under pressure—the retort is used for the same purpose as the exhaust box—the exhaust box system does not cook under pressure—it is open at either end, the retort is closed. The can is sealed in the retort, in the first cooking, and when it comes out of the first cook, in order

(Testimony of John S. Hume.)

to get the vacuum the can is vented, then re-cooked in the same manner. The heat in the can expels the air; the cooking of the salmon serves the same purpose as the exhaust box. And with the exhaust box the salmon is cooked about eighty minutes at about 242 degrees temperature. Without the exhaust box, under the two cooking system, you ordinarily cook the can half an hour in the first cooking and about an hour in the second cooking. Between the two cookings the cans are ordinarily examined to determine if they have leaks. There is a hot leak testing after the first cooking. If the cans collapse after the first cooking, it denotes a leak and if the can is a heavy weight leak it is called a hot leak and it is mended then and there and put [68] in with the second cooking. After the second cooking with the old style cans some defective tins will ordinarily be discovered, they are do-overs. A heavy weight leak means that all of the juices of the salmon which have been cooked out of the meat have not leaked out of the can, but a considerable portion still remains in the can; enough to give it a substantial weight. A hot leak and a heavy weight leak are identical. If it is a dry can it is treated as a do-over; salt water is sometimes put into dry cans to take the place of the juices of the fish which have leaked out. The time within which a defective can must be re-processed after the leak is discovered depends entirely upon the size of the leak. If the leak were large enough the fish might decompose within three or four days; if it were very small it might not decompose

(Testimony of John S. Hume.)

within three or four months. A so-called sanitary can is now used. There are no do-overs to such extent with the new or sanitary cans. They require no venting and the tops are not soldered on but are fastened by machinery. They first came into use, I think, in 1908, coming gradually into general use. All fish canned from the same variety of salmon would be of the same grade and quality. In do-over salmon there are different grades; we have do-overs of the Alaska reds, and do-overs of Alaska pink salmon and of other varieties of fish that are being canned that season. We have do-overs of the different grades of fish—red Alaska salmon is the highest grade of Alaska salmon. There is no difference in the keeping qualities between a salmon originally processed and a do-over of the same grade properly processed.

Q. Mr. Hume, will a can of do-over salmon, properly processed [69] and hermetically sealed, ever swell?

A. Not if it has sufficient vacuum.

Mr. KNIGHT.—Q. What can you state, Mr. Hume, as to the edibility of do-over salmon if properly re-processed and properly canned?

Mr. WISE.—There is no debate on that subject between us, Mr. Knight.

Mr. KNIGHT.—I think not.

Cross-examination.

I have never been in Northern Alaska, where the defendant's canneries are located. I do not know what system is used by them. A small percentage of

(Testimony of John S. Hume.)

swells are discovered long after the can is put up. Swells do occur long after the can is put out, either because of a small leak, which cannot be detected in the processing, or insufficient vacuum in the can when it was processed. If it has not four inches of vacuum in it when processed it may deteriorate at any time thereafter. A large parcel of salmon will develop a very small proportion of swells over a period of years; there may be such a defect in the can and so indiscernible that it might require months before the result of the defect will be followed by decomposition. That is also true of the lack of vacuum in a can; it may require several months before that defect, whichever of the two it may be, results in the decomposition of that product, or the fish itself.

The COURT.—Q. Mr. Hume, it is a fact, I believe, demonstrated by practical experience in the canning process of salmon, that no matter what degree of care is used in the process at a cannery that there always will be found in due [70] course of time a certain percentage of spoiled salmon, in any factory; is that not true? A. That is a fact.

Q. I suppose that would necessarily bear upon that, but it is a fact demonstrated by experience that any processing, no matter how careful, does not prevent eventually the development in a pack of salmon of a certain percentage of bad salmon?

A. There is no pack that is 100 per cent perfect. In practice do-overs have a larger percentage of spoiled cans than the best grade of salmon.

(Testimony of John S. Hume.)

A heavy weight do-over is one in which the defect in the can is discovered after the first cooking. It is sold in a class by itself. From what I have heard in this courtroom with regard to the brand known as Polar King I would suppose it to be a do-over.

Redirect Examination.

Mr. KNIGHT.—Q. Give us the highest percentage that you know of salmon that has developed swells over a period of years if properly processed, and excluding the salmon in controversy.

A. I could not say.

Mr. KNIGHT.—Q. Can't you state whether it is one-half per cent of 5 per cent, or any percentage? My original question was to get your experience, so that the jury might get some idea of the relative percentage of tins that did swell, but only after the passage of several years.

A. One per cent would be excessive. [71]

Testimony of C. R. Morse, for Plaintiff.

C. R. MORSE, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am secretary of the American Trading Company and have been such about 13 years. Cans containing salmon marked Archer Brand were sent to the office of the American Trading Company in 1912 shortly prior to the time the American Trading Company paid for that salmon. I think probably if I said a week prior I would be close to it. A number of the cans were opened at different times in my presence before the plaintiff made payment for the salmon.

(Testimony of C. R. Morse.)

The samples were opened shortly after they were received. The condition of the contents was entirely satisfactory for that kind of salmon. The contents were all good from an edible standpoint. It has always been the practice of prior dealings between the plaintiff and defendant for defendant to furnish samples of Archer Brand salmon sold to plaintiff prior to payment. Customarily these samples were furnished as soon as the salmon arrived and was available. Payments were made customarily by the plaintiff to defendant after the examination. I should say we examined about a dozen of cans of samples. The tins were opened in my presence by Mr. Field. I tasted every tin and found it edible. By my statement that the samples were satisfactory for that kind of fish I meant that do-over salmon has not the same amount of oil that standard has; a little is lost in the re-cooking; it does not present quite the appearance of the high-grade salmon; it has not quite the richness of taste.

The bulk of the salmon, as distinguished from the [72] samples, was not examined by plaintiff prior to the time payment was made. I made an examination of the salmon subsequent to the time of making payment for it in company with Mr. Field and Mr. Paul Hartman at the Mission Rock warehouse, in San Francisco. There were two examinations. The preliminary examination showed about 25 per cent inedible. We took a tin out of each 100 cases. In that examination we did not take any tins that showed any exterior evidence of damage to the con-

(Testimony of C. R. Morse.)

tents. The second examination was made almost immediately thereafter. Almost immediately after we completed the preliminary examination we started the second examination; I think it was the next day. It was completed April 30, 1913, and consumed two or three weeks. We pulled down every fifth case in the entire pile of 2,100 cases and took one tin out of each, excluding all that appeared swelled or otherwise defective. The result of that examination showed 30.2 per cent inedible; there were 417 tins examined; 126 tins were inedible. It was an organoleptic test by the senses of smell and sight.

Cross-examination.

The only date which the records I have before me, with reference to the examination which I have testified to, shows that the second examination was completed on April 30th, 1913. The examination took, I should judge, about three weeks. I am certain it was completed on April 30th. We devoted several hours a day to this examination. The statement that the samples of the 1912 pack furnished by defendant were examined by me prior to the payment for the shipment of Archer Brand salmon is made entirely from my recollection. [73] I made no memorandum of the date. I have discussed the matter with Mr. Field and Mr. Knight. There was nothing to impress the circumstances of the examination of these samples upon my mind except they were the last do-overs we handled. At the time I examined them I did not know this fact. Plaintiff

(Testimony of C. R. Morse.)

handled forty or fifty thousand cases of salmon of all kinds during the year 1912. I never examined any other tins in the office than those samples furnished by defendant and samples of the Polar King salmon furnished under the same contract. The other business was handled in quite a different way; salmon that we buy in Vancouver and Seattle we pay an inspector to examine; he issues a certificate and that is satisfactory to us. I could not say from whom else we bought salmon in the fall of 1912 except the defendant. With the exception of the salmon purchased from the North Alaska Salmon Company, I made no examination of any other purchased from 1909 to 1916.

The COURT.—Mr. Morse, did you testify, or was it Mr. Field, that samples were always furnished you on these purchases?

A. I think Mr. Field testified to that.

Q. Was that a fact? A. It is.

Q. Now, samples were never sent to you until after the arrival of the fish in San Francisco, were they?

A. No, but it might be sent to us before we were notified that the bulk of the salmon was available in the warehouse.

Q. But here Mr. Field testifies that he requested these samples to be sent him after he got this letter. How do you construe that; if it was the uniform habit to send samples to [74] you after the arrival of the fish, why was it necessary for Mr. Field to specially request that samples of the shipment be sent to him?

(Testimony of C. R. Morse.)

A. I don't know that he made any special request.

Q. Don't quibble with me; answer my question; he says that he made a special request. Now, why would he do that, if it was the uniform habit to send samples; that is what I am asking you.

A. I don't know.

During the year 1912 plaintiff sent a case of forty-eight tins of Archer brand salmon to the American Trading Company's agency in Manila; this case was sent directly from the Mission Rock Warehouse to the Steamship Company. It was never examined in the San Francisco office; I do not find that any report was ever made upon this salmon. I have no record of any complaint. Having in mind that the salmon was paid for on November 18, 1912, I am of the opinion that the examination which was made of the samples by me took place about a week prior to that time. As I remember it, the samples in the office were opened a few tins at a time covering several days; I would say that it took approximately a week to examine those tins. There is no reason that I know of why the examination should not have been completed in one day. [75]

Testimony of C. O. S. Gallant, for Plaintiff.

C. O. S. GALLANT, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a laboratory helper in the United States Food and Drug Inspection laboratory, Department of Agriculture; my office is at room 53, Appraisers' Building, San Francisco. I occupied the same position in the spring of 1913. I assisted Mr. Moore in

(Testimony of C. O. S. Gallant.)

getting samples of Archer Brand salmon in Mission Rock warehouse about the 2d of July, 1913. We took 192 cans, one from each case, here and there; we brought them down, put them in a launch, and had an expressman bring them to the office. They were in Mr. Moore's charge, and later we sent 48 cans out of the 192 to the Seattle laboratory of the United States Government. The outside appearance of the tins we selected was good. I sent them to Seattle on the 26th day of December, 1913, and personally attended to the shipment. There was an artificial heat at the Mission Rock warehouse where the salmon in question was stored, and no heat at all in the storeroom at the U. S. laboratory in San Francisco where the 192 tins of samples were kept by me until examined there or sent to Seattle.

Testimony of Roy W. Hilts, for Plaintiff.

ROY W. HILTS, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

Q. What experience have you had in salmon canneries?

A. I spent about a month around Puget Sound inspecting salmon [76] canneries and making certain experiments in them to get certain information we desired.

I examined Archer Brand salmon in the Seattle laboratory of the Department of Agriculture in January and April, 1914. It came from the San Francisco food inspection laboratory by express. I examined 48 cans and found that 38 of these cans were evidently do-overs. As to the balance, I could not

find any evidence of their being do-overs. I opened the cans and examined them. I found 16 were actually spoiled, 12 cans were more or less soft and stale, showing incipient decomposition, 15 cans were what I would call as passable and 5 of the tins were good. There were one swell and one leak among the bad tins. The leaky cans did not have a vacuum, the others did. Other than those two cans there was no external indication of damage.

The COURT.—Do I understand you to say that 12 cans gave evidence of beginning to deteriorate?

A. Yes, they were spoiled. The can were kept in a storeroom while in Seattle, which was generally very chilly.

Previous to my being in the Government service I was with Armour & Co. for 3 years, who operate large canneries, and assisted in the investigation of some problems connected with the canning of meats. In 1913, under the instructions of the chief of our bureau, I made a trip to a number of salmon canneries on Puget Sound, observing the methods and making tests of the pack, getting certain information we wished. In my official capacity I have had occasion to examine samples of canned salmon as they were submitted in the routine of business covering about seven years. I examined possibly [77] 10 or 12 samples a year. The 48 cans were examined at Seattle by taste and smell. No chemical analysis of the salmon was made. I compared these 48 cans with samples of standard salmon which I had on hand. I have never been in Alaska. I do not

(Testimony of Roy W. Hilts.)

know how the salmon in controversy was packed, except by conversation with men who have worked in the Alaskan canneries; I do not know what method is used in handling the salmon—in shipping it from Alaska to San Francisco.

Q. How in your opinion was the swell condition of this salmon produced?

A. I think it was caused by spoilage before the tins were last sealed and sterilized.

Q. Can you state a little more particularly what you mean by that?

A. I mean that it would have been impossible for those cans to have obtained their condition and not to have swelled unless the spoilage had occurred previous to the last sterilization and sealing of the cans.

There was one swell that must have become swelled through the process of decomposition that was going on in the can, with the action of the bacteria that were causing decomposition. All the spoiled ones wouldn't swell because some of them had been sterilized after they spoiled, thereby killing the bacteria and preventing the further evolution of gas and thereby the can retained its vacuum which it had at the time it was put into it. The cans that were not swelled contained material that was originally spoiled when the cans were finally re-processed; decomposition was not proceeding any further, but decomposition was proceeding in the tin that was [78] swelled and producing a gas. As to the 12 cans showing incipient decomposition, what I meant

was that their odor was not clean and sweet, and that the meat in the can had undergone incipient decomposition at some stage in its history; it must have occurred before they were last sealed and sterilized because they were not swelled.

Cross-examination.

I found one leaky tin among those that I examined. The cause of a leak developing a year and a half after the salmon is packed is due sometimes to a bit of scale between the solder and the body of the can and the softening of the solder might remove the scale and permit the air to enter the can or if the cans were stored in a very damp place, the tin might rust through the outside and produce a leak. Such a can would not swell. Frankly, I cannot tell when the swell or leak developed.

Q. Did you ever know of a swell developing in salmon a year and a half after it was packed, of your own knowledge?

A. Not of my own knowledge, no.

When I said that 15 of the remaining 46 cans were passable, I meant that they were good enough to eat. I would not have condemned salmon like that. As to the 12 cans showing incipient decomposition had begun when they were last sterilized, but it had been checked by the sterilization and had not progressed since sterilization. As to the 16 cans that were bad, they had been permitted to spoil before the last processing was done. The cans designated as passable were good enough to eat. If cans of salmon to be reprocessed were permitted to stand a few days in the

(Testimony of Roy W. Hilts.)

cannery before such re-cooking or re-processing, they would get into the condition [79] in which I found these spoiled cans.

I remember that a number of these cans which I examined showed rust on the exterior. I cannot tell the exact number. I judge it could not have been a preponderating number or I would have used different language in my memorandum. The rust comes from an atmospheric moisture. If the rust is permitted to go to such an extent that the tin has corroded through and the can leaks and air gets into the can and bacteria find entrance, then the food will spoil. If all the bacteria are not killed in the cooking process, decomposition might develop, even in a hermetically sealed can.

Q. In other words, bacteria in a hermetically sealed can will develop long after the process of closing the tin has been completed?

A. Sometimes that will occur. Sometimes after the closing has been done, but that is usually within a very reasonable time that the swell occurs, if it is in a moderately warm place. By reasonable time, I mean within a few months of the time that the canning takes place, if it is taken into a warm atmosphere.

The COURT.—Decomposition can take place in a hermetically sealed vessel, can it? A. Yes.

Q. In other words, the hermetically sealing from the air does not prevent the process of decomposition if the seeds of it are in the container at the time it is sealed?

(Testimony of Roy W. Hilts.)

A. There are many sorts of bacteria than can develop under these conditions—yes.

The bacteria which are in the fish at the time it [80] is canned are presumed to be killed by the application of heat in the cooking process.

A. After the proper degree of heat has been used for the required period of time and the food stuff is then put into a tin and hermetically sealed, if that degree of heat did not kill the bacteria, the decomposition will develop later on—the bacteria will develop and result in decomposition later on?

A. In the course of time.

Testimony of Benjamin R. Hart, for Plaintiff.

BENJAMIN R. HART, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am chief of the western division of the United States Bureau of Chemistry, in the Department of Agriculture, embracing that part of the United States west of Denver; I was appointed in December, 1913, coming to San Francisco direct from the city of Washington. I am a chemist. I have made a complete study of almost all canning that is done in the country, that is, the different varieties of stuff. I have been in the department about twelve years and have worked in a good many different states and made a good many different canning tests. I have made a study of canning by going into the canneries and had goods canned under normal conditions as they usually can them, and sometimes I have changed canning methods and studied the results. Spoilage

(Testimony of Benjamin R. Hart.)

in canned salmon is generally due to three things: The [81] goods were either in bad condition at the time they were canned, or they were either in good condition and were improperly processed and canned, or they were in good condition and might have been properly canned and then some accident to the cans afterwards caused the air to get into them, admitting bacteria and other contaminating elements. When I spoke of improper cooking or improper processing, I had reference to the sterilization of the product. If the product is sterilized properly and the can still has a vacuum in it and has no hole in it, and if the goods inside of the can under those conditions are bad, it is evident that it was bad at the time of the last sterilization; it must be so.

Cross-examination.

The Government has not prohibited the commercial use of do-over salmon. Do-overs are used today but to a very limited extent compared to what it used to be on account of the use of sanitary cans. There is quite a little bit yet that is do-overs. Do-over salmon has never been a suspicious commodity to the Food and Drug Inspector; it never has been to me. I think that if a do-over is properly prepared and handled right, there is no reason why the food value is not as good as any other salmon, and it will keep just as well as a standard tin. A do-over is not caused by any trouble in the meat itself or any inferior article in the meat itself—it is merely an accident in the canning. The reason a do-over is considered a secondary grade is because it has been

(Testimony of Benjamin R. Hart.)

allowed to stay around too long. I know that do-overs are sometimes regarded with suspicion, because we know this do-over salmon is sometimes bad. [82]

Q. Will you say that the desire to eliminate do-overs altogether from the market contributed very considerably to the introduction of the sanitary can?

A. I should say that, yes.

That has happened a great many times and that is what has given the do-over its bad name. Salmon soup is composed of the heads of salmon boiled for the purpose of supplying additional salmon oil to do-overs. On the other hand, the price in the handling of the sanitary can and the ease with which it is sealed up and the doing away of the hand soldering, has had as much to do with it as anything else; and aside from that they can now lacquer the inside of the cans in such a manner that when the top is put on the fish and the contents of the can do not touch the tin in any place. The sanitary can is the greatest improvement ever put into the canning industry. It began to come into use in 1912.

Redirect Examination.

The sanitary can has another advantage in its appearance. Machinery prepares the can for use. [83]

Deposition of H. F. Swift, for Plaintiff.

Thereupon plaintiff read in evidence the deposition of H. F. SWIFT, who testified as follows:

I am and have been since 1894 engaged in the busi-

(Deposition of H. F. Swift.)

ness of canning salmon. I was superintendent of a cannery in 1899 and until 1912, and then I built and operated a cannery of my own.

The operation of canning salmon with the old style can is as follows: Fish come from the fishermen taken on the dock; from there they are, either by hand or by machinery, cleaned; from there they go to what is known as the fish cutter, a set of revolving knives, that cut them into four inch pieces, the size of the salmon can; from there to the filling machines, which fill the can with salmon by machinery automatically; from the filling machines they are discharged on to a table where any light cans—that is, cans that are not entirely filled with fish—are filled up with small pieces of salmon to make the weight. Some canneries use a weighing machine; most of them simply gauge it by hand. From there they go through a wiping machine, or a steam wiper, that washes the grease off of them; from that into a soldering machine, which solders on the top. Then they roll down a long rollway, which cools off the solder that has been put on the top, hermetically seal it, and they are taken and put into iron trays or coolers. The hole or vent that is in the top of the can is then sealed with a soldering iron. Next they are immersed in warm water so that any leaks that may be in the can will be detected by discharge of air through the water producing little bubbles of air. Such leak cans are taken out and immediately mended by men [84] who are stationed there for that purpose, and are put back into the coolers, and from

(Deposition of H. F. Swift.)

there they are put into retorts, cooked usually 30 minutes at a temperature of 212 degrees. The retorts are then opened and the salmon is put on a table in the coolers and the processors go over the salmon with a little mallet, striking them on the end first. If there is a leak can, the ends collapse when they are tapped with this mallet, the ends having been puffed out by the pressure generated by the heating during the cooking. If the salmon can does not leak, the end will stay expanded. If the can comes through that retort without being puffed out at the ends, that indicates that there is a leak, and that the heat and expansion has developed the leak sufficiently to expel the air. The cans are then struck by a little mallet with a pin point in the end of it, which punctures another hole in the can; that lets both ends collapse again; then they are immediately re-soldered. This opening that has just been punctured in there has been re-soldered. Then they are put into the retort again and cooked, usually at a temperature of 240 degrees for one hour. From there, after the cooking, they are taken out and the coolers containing the salmon are spread out upon the floor space reserved for that purpose and allowed to cool, usually until the next day; then they are tested by sound with a small striking iron for that purpose, and when leaks are found there, are taken out and put to one side until time can be found to mend them again. After that they are piled up in the warehouse, one can on top of another, piled away closely until time can be found to label them

(Deposition of H. F. Swift.)

and fix them up. I should say after they come out of the retort the second cooking, they go through what is called [85] the lye bath; that is, hot water and lye to clean the salmon cans off thoroughly and scrubbed. Before the cans leave the factory they are shallacked. If a leak develops it is set aside to be re-processed. To do this they are mended and put through a retort again, cooked usually for half an hour, and then they are brought out, and they go through the same process again; if the leak cans are mended immediately they are not usually called a do-over; they are practically the same as good salmon. As the term is used in the salmon trade, a do-over is one that has been re-processed twice or more —set aside to be re-cooked. After a leak is discovered I would not leave a can myself for three days. Anything in my pack that has been over three days standing as a leak I would not put in as good salmon. If a leak has been developed and the leak is not mended, say, within three days before being re-cooked, the salmon would undoubtedly commence to deteriorate. A great deal would depend on the size of the leak. If a very infinitesimal leak the salmon might be practically edible for a week or ten days, but if the leak were of any size at all, it would deteriorate very rapidly and become inedible; and if it had become inedible, there would be no possible way of making it good. There is no way of telling by external appearance of the cans whether the contents are edible or not.

Up to and including 1912 do-over salmon was a

common article in the market, sold as edible salmon. A good can of do-over salmon will keep indefinitely, by actual experience ten years. If a can of do-over salmon was found in a bad state of decomposition when the can was opened, say a year after it was packed, I would say that it was in that condition when [86] the can was mended and hermetically sealed, must have been decomposed at that time; it would not decompose any more after it was sterilized, by cooking and hermetically sealed.

Cross-examination

Q. You class as No. 1 salmon all salmon reprocessed on the same day?

A. All salmon re-processed on the same day is No. 1 salmon; no possible change in the condition at all. When salmon comes out of the retort and you find a leak in it which is mended immediately, there is no difference in that salmon and the other can alongside of it.

I have never been at the canneries in Northern Alaska. My canning experience has been altogether in Southeastern Alaska.

The use of sanitary cans and difficulty of mending leaks in them virtually put do-overs out of existence. A do-over I consider an inferior grade of salmon; sold as second-grade salmon by the brokers for the reason that a length of time has elapsed and there must be some deterioration in it, not a first-class article; probably a great part of the fat from the fish has escaped by the leaks, dried, or hasn't got the fat in it to show up good when it is opened; in fact, it is

(Deposition of H. F. Swift.)

an inferior grade of food. It might be perfectly edible and harmless, provided the can had not been leaking long enough to sour or deteriorate. A great part of do-overs are simply light cans filled with salt water which would not affect the quality of the meat particularly; it wouldn't look good when it was opened, no oil or fat on the juice. I think I would be safe in saying that probably one-third of what are [87] sold as do-overs are simply light cans filled with salt water; might not be leak cans at all. Where there are leak cans there is a certain amount of deterioration in the fish itself.

Mr. KNIGHT.—I now offer in evidence the judgment-roll in the case of United States of America vs. 2,100 Cases of Canned Salmon heretofore pending and determined in the District Court of the United States in and for the Northern District of California. This is the salmon referred to by the witnesses as having been in the Mission Rock warehouse.

Mr. WISE.—I object on the ground that it is incompetent, irrelevant and immaterial; that this defendant was not a party to that proceeding.

The COURT.—Objection sustained.

Mr. KNIGHT.—I will reserve an exception.

The COURT.—Allowed.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 1.

Said judgment-roll is in words and figures following, to wit:

Judgment-Roll—United States of America vs. Twenty-one Hundred Cases Salmon.

In the District Court of the United States, in and for the Northern District of California, Northern Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

TWENTY-ONE HUNDRED CASES SALMON,

Defendant.

To the Honorable Court Above Named:

The United States of America, through Benjamin L. McKinley, United States Attorney for the Northern District of California, respectfully show:

That the libelant above named, in its own right, prays for seizure and condemnation of certain articles which may be [88] used either as a food or as a drug, to wit, Twenty-one Hundred Cases of Salmon;

That the said libelant is informed and believes and therefore alleges that the said twenty-one hundred cases of salmon were shipped by the North Alaska Salmon Company in interstate commerce from the Territory of Alaska to the city and county of San Francisco in the State and Northern District of California, and arrived in the City and County of San Francisco, State and District aforesaid, as follows: A portion on steamer "St. Andrews," September 7th, 1912; a portion on steamer "Oriental," September 18th, 1912; a portion on steamer "Curtis," on Octo-

ber 5th, 1912; a portion on steamer "Olympic," on October 14th, 1912, and the said twenty-one hundred cases of salmon are now in the same condition in which they were shipped from the Territory of Alaska to the city and county of San Francisco, in the State and Northern District of California, and have always remained ever since said shipments in the same condition in which they now are;

That on November 26th, 1912, the said North Alaska Salmon Company sold the said twenty-one hundred cases of salmon to the American Trading Company (Pacific Coast).

That the libelant is informed and believes and upon such information and belief alleges that the fish contained in the said twenty-one hundred cases of salmon is adulterated under the provisions of section 7, paragraph 6, of the act of Congress of June 30th, 1906, known as the Food and Drugs Act, in that the fish contained in the said twenty-one hundred cases of salmon consists in whole or in part of a filthy decomposed or putrid animal or vegetable substance.

That the said twenty-one hundred cases of salmon constituted an interstate shipment from the Territory of Alaska to the city and county of San Francisco, in the State and Northern District of California, in interstate commerce as above [89] set forth, and are now within the jurisdiction of this Honorable Court in the original unbroken cases.

That the source of libelant's information is an official communication by wire received from the Secretary of Agriculture under date of July 11th, 1913, which said communication is hereunto attached by

copy and made a part of this libel and marked Exhibit "A."

WHEREFORE, in consideration of the premises your libelant prays that said articles which may be used either as a food or as a drug, consisting of twenty-one hundred cases of salmon, may be proceeded against and seized for condemnation in accordance with the act of Congress approved June 30th, 1906, and to this end this Honorable Court may issue the process of attachment in due process of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, so far as practicable in this case, and that the said American Trading Company (Pacific Coast) and all other persons, firms and corporations having or pretending to have any right, title or claim in and to said articles which may be used either as a food or as a drug above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid and that if the said American Trading Company (Pacific Coast) cannot be found, it be cited by process of publication in the manner provided by law;

That by an appropriate order this Honorable Court may adjudge and decree that the said articles of food and drugs hereinbefore particularly mentioned and described, be condemned at the suit of this libelant according to the provisions of the act of Congress hereinbefore set forth; that this Honorable Court may pass all such orders and decrees and judgment as may be necessary in the premises and may grant your libelant a decree for the costs of this proceeding against the said AmericanTrading Company (Pacific

Coast) or the owners or holders of said [90] articles condemned, should such costs not be satisfied out of the proceeds of the sale, and that your libelant may have such other and further relief as the nature of the case may require.

B. L. McKINLEY,

Attorney for the United States in and for the Northern District of California.

T. H. SELVAGE,

Asst.

EXHIBIT "A."

"Washington, D. C., July 11, 1913.

U. S. Attorney, San Francisco, Calif.

American Trading Co., San Francisco, have in possession twenty-one hundred cases salmon packed and processed by North Alaska Salmon Co. of Alaska and transported from Alaska by their own vessels to San Francisco, sold and delivered to present owner under invoice dated Nov. twenty-six, nineteen twelve. Delivery was made at various times by following boats of Packer. There is nothing to indicate the quantity delivered by each boat but trips were made as follows: "Stamdrews" on Sep. seventh, nineteen twelve. "Oriental" on Sept. eighteenth, nineteen twelve, "Curtis" on October fifth, nineteen twelve, "Olympic" on October fourteenth, nineteen twelve, products now on premises of Mission Rock Warehouse of the Hasslett Warehouse Co., San Francisco. Shipping cases are branded "4 doz talls Archer Brand Salmon—packed for A. B. Field and Co., inc., agents, San Francisco."

Cans are labeled "Archer brand Alaska Salmon—red —A. B. Field and Co., inc., distributors, San Francisco. Official sample analyzed in San Francisco laboratory bureau of chemistry showed that one hundred cans twenty-eight per cent was putrid or sour and that product is a do-over product. Another analysis of official sample in San Francisco laboratory showed thirty-nine per cent putrid or sour. Laboratory also reports that the owner examined four hundred seventeen cans and admitted that thirty-two per cent was sour or putrid in being putrid and decomposed in the amount of twenty-eight to thirty-nine per cent product is adulterated in violation of food and drugs act, paragraph [91] six, section seven, under food. Consignment subject seizure and confiscation under section ten. Department recommends immediate seizure goods can be identified by A. B. Field, employee of American Trading Co. Evidence adulteration furnished by H. J. Holland and F. D. Merrill of San Francisco laboratory; evidence sale and interstate delivery furnished by inspector H. C. Moore, please wire action taken.

D. F. HOUSTON,
Secy."

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

H. C. Moore, being first duly sworn, deposes and says:

That he is a Food and Drug Inspector of the Bu-

reau of Chemistry, United States Department of Agriculture, San Francisco, California; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

H. C. MOORE.

Subscribed and sworn to before me this 12 day of July, 1913.

C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Jul. 12, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

In the United States District Court, in and for the Northern District of California, First Division.

No. 15,436.

UNITED STATES OF AMERICA,
Libellant,

vs.

TWENTY-ONE HUNDRED CASES SALMON,
Defendant.

Stipulation Extending Time of Claimant to Except, etc., to Libel.

It is hereby stipulated and agreed that the American [92] Trading Company (Pacific Coast), claimant herein, may have ten (10) days from the

date hereof within which to except, move or plead to the libel on file herein.

BENJM. L. McKINLEY,
United States Attorney.

Dated San Francisco, Aug. 11, 1913.

In the District Court of the United States, in and for the Northern District of California, First Division.

UNITED STATES OF AMERICA,
Libellant,

vs.

TWENTY-ONE HUNDRED CASES SALMON,
Defendant.

Answer.

To the Honorable The District Court AboveNamed:

The answer of American Trading Company (Pacific Coast), claimant, to the libel herein, respectfully sets forth as follows:

I.

Claimant admits that all of the allegations of *of* the libel herein are true, except as hereinafter particularly set forth.

II.

Claimant denies that all of the fish contained in the twenty-one hundred cases of salmon referred to in the libel herein as adulterated within the meaning of section 7, paragraph 6 of the act of Congress of June 30, 1906, known as the Food and Drugs Act, but in this behalf claimant alleges the fact to be that some of said salmon, as hereinafter more particularly

set forth, is not so adulterated, and is not filthy, decomposed or putrid animal or vegetable substance, or is not any portion of an animal unfit for food, whether manufactured or not, or is [93] not the product of a diseased animal, or one that has died otherwise than by slaughter, but is fit for consumption. In this respect claimant further alleges the fact to be that heretofore, and of the purpose of determining the fitness of said salmon for consumption, and after its importation into this port, as set forth in the libel herein, claimant selected one tin out of each of one hundred cases of said salmon as a sample, no one of which tins was rusty, swelled, or otherwise indicated any defect. As the result of such examination it was ascertained that the contents of 25% of such tins so selected as aforesaid were sour, rotten and putrid, and a considerable quantity of the contents of others of said tins so selected was also not fit for consumption. Thereafter, a further examination of the salmon in controversy was made by claimant by selecting therefrom out of every five cases of the entire lot one tin which was neither rusty, swelled, or in any way indicated defective condition. Of these tins 126 out of 417 or 30.2% were found to be sour, rotten and putrid, and a further considerable quantity was also found to be unfit for consumption, and the total amount of salmon so found fit for consumption as the result of said examinations was approximately 65 to 70% of the samples so selected.

Claimant further alleges that a considerable quantity of the tins containing the salmon referred to in the libel herein, the exact quantity whereof is un-

known, is rusty, swelled or discolored, and thus indicate that the contents thereof are not fit for consumption.

WHEREFORE, claimant prays the judgment of this Court as to the condition and quality of said salmon, and each and every part thereof, and whether or not the same is liable for condemnation and sale, and for such other and further relief in the premises as it may be entitled to.

SAMUEL KNIGHT,
Attorney for Claimant. [94]

United States of America,
State and Northern District of California,
City and County of San Francisco.—ss.

L. A. Ward, being first duly sworn, deposes and says:

That he is an officer, to wit, the manager of American Trading Company (Pacific Coast), a corporation, claimant herein, and makes this affidavit of verification on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters that are therein stated on information or belief, and as to those matters he believes it to be true.

L. A. WARD.

Subscribed and sworn to before me this 13th day of August, 1913.

[Seal] A. J. NAGLE,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed. [95]

Monition.

NORTHERN DISTRICT OF CALIFORNIA.—ss.

The President of the United States of America, to the Marshal of the United States for the

[Seal] Northern District of California, GREETING:

Whereas, a libel of information hath been filed in the District Court of the United States, for the Northern District of California, on the 12th day of July, in the year of our Lord one thousand nine hundred and thirteen, by Benj. L. McKinley, Esq., Attorney for the United States for the Northern District of California, in the name and in behalf of the United States of America against twenty-one hundred cases salmon, for the reasons and causes in the said libel of information mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said twenty-one hundred cases salmon may be cited in general and special, to answer the premises, and all proceedings being had that the said twenty-one hundred cases salmon may for the causes in the said libel of information mentioned, be condemned and sold to pay the demands of the United States of America.

You are therefore hereby commanded to attach the said twenty-one hundred cases salmon and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not

be condemned and sold pursuant to the prayer of the said libel of information, that they be and appear before the said court, to be held in and for the Northern District of California, on Tuesday, the 29th, day of July, 1913, at ten o'clock in the forenoon of the same day, if the same day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, [96] then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

WITNESS, the Honorable WM. C. VAN FLEET, Judge of the said court, at the city and county of San Francisco, in the Northern District of California, this 12th day of July, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-eighth.

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

BENJ. L. McKINLEY,
U. S. Attorney.

In obedience to the within Monition, I attached the twenty-one hundred cases salmon (which consisted of twenty-one hundred and 92 cases and 9 cans), salmon described, on the 14th day of July, 1913, and have given due notice to all persons claiming the same that this Court will, on the 29th day of July, 1913 (if that day should be a day of juris-

diction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same. I further return that I took the above twenty-one hundred and ninety-two cases and 9 cans of salmon) into my possession at Mission Rock in the bay of San Francisco, at San Francisco, and stored the same in the Haslett Warehouse at Mission Rock, in the bay of San Francisco at San Francisco, Cal., and posted a notice of seizure thereon. I further return that I handed to and left with, P. E. Haslett, Secretary of the Haslett Warehouse Co., a true and correct copy of this monition.

C. T. ELLIOTT,
U. S. Marshal.
J. W. Grover,
Office Deputy.

Dated San Francisco, Cal., July, 14th, 1913.

[Endorsed]: Filed July 15, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 29th day of July, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WM. M. MORROW, Judge.

#15,436.

UNITED STATES

vs.

2100 CASES OF SALMON.

Minutes of Court—July 29, 1913—Return of U. S. Marshal to Monition.

The United States Marshal having returned the Monition issued herein that "in obedience to the within Monition, I attached the twenty-one hundred cases salmon (which consisted of twenty-one hundred and ninety-two cases and 9 cans salmon), therein described, on the 14th day of July, 1913, and have given due notice to all persons claiming the same that this Court will, on the *92*th day of July, 1913 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claims be interposed for the same. I further return that I took the above twenty-one hundred cases salmon (which consisted of twenty-one and ninety-two cases and nine cans of salmon) into my possession at Mission Rock Bay, San Francisco, at San Francisco, and stored the same in the warehouse at Mission Rock in the bay of San Francisco, at San Francisco, Cal., and posted a notice of seizure thereon.

I further return that I handed to and left with P. E. Haslett, Secretary of the Haslett Warehouse Co., a true copy of this Monition.

C. T. ELLIOTT,
U. S. Marshal,
By J. W. Grover,
Office Deputy.

Dated San Francisco, Cal., July 14, 1913." [98]

On motion of W. E. Hettman, Esqr., Asst. U. S. Atty., proclamation was duly made for all persons claiming any right, title or interest in said cases of salmon to appear and answer the libel herein and on motion for claimant, by the Court ordered that claimant have ten days to appear and plead to said libel.

[Endorsed]: I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above-entitled ———.

Attest my hand and seal of said District Court, this —— day of ————, A. D. 191—.

W. B. MALING,
Clerk.

By ————————,
Deputy Clerk.

At a stated term of the District Court of the *District Court of the* United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 18th day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,436.

UNITED STATES

vs.

TWENTY-ONE HUNDRED CASES OF SALMON.

Minutes of Court — September 18, 1913 — Order Directing Entry of Decree of Condemnation, etc.

This cause this day came on for hearing, W. E. Hettman, Esqr., Asst. U. S. Atty., appearing for the Government, and F. E. Boland, Esqr., appearing for the respondent. Mr. Hettman called H. C. Moore, H. J. Holland and Frank D. Merrill, who were each duly sworn and examined as witnesses on behalf of the Government. By the Court ordered that a decree of condemnation and destruction be entered as prayed. [99]

In the District Court of the United States for the Northern District of California.

No. 15,436.

THE UNITED STATES OF AMERICA

vs.

2100 CASES OF SALMON.

The monition in this case having this day been returned duly executed, the usual proclamation was made, and default of all parties not in court having been entered, it is by the Court now here on motion of W. E. Hettman, Esq., Assistant United States Attorney, ordered, adjudged and decreed, that the following described property, to wit, 2100 cases of salmon mentioned and described in the Libel of Condemnation on file herein, be and the same is for the reasons and causes in said Libel of Condemnation set forth hereby condemned as forfeited to the

United States of America, for the uses and purposes as by statute provided.

Entered this 18th day of September, A. D. 1913.

[Endorsed]: Filed Sept. 18, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Note: Identical copy hereof filed with following endorsement and certificate:

A true copy. Attest:

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN.

I HEREBY CERTIFY AND RETURN that I received the within Writ at San Francisco, Cal., on September 18, 1913, and executed the same on September 19, 20, and 22d, by destroying the within-named salmon by burning the same at the Sanitary Reduction Works in the city and county of San Francisco.

C. T. ELLIOTT,
U. S. Marshal.
By Paul J. Americh,
Office Deputy. [100]

In the District Court of the United States for the Northern District of California.

15,436.

THE UNITED STATES

vs.

2100 CASES OF SALMON.

Certificate of Clerk U. S. District Court to Judgment-Roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 18th day of September, 1913.

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Filed Sept. 18, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Deposition of Walter A. Frost, for Plaintiff.

Thereupon plaintiff read in evidence the deposition of WALTER A. FROST, who testified as follows:

I reside in Chicago, Illinois, and have been engaged in the business of handling canned fish of various kind for 30 years. I have handled Archer Brand do-over salmon 4 or 5 years. I handled some of the 1911 pack of that salmon and found it exceptionally good for that quality of salmon, and perfectly edible, with the exception of a [101] very few cans; it was satisfactory to the people who handled it and to those who consumed it, so far as we know. There are always some cans in do-overs that are not up to the standard. It is customary in

(Deposition of Walter A. Frost.)

our trade for a broker handling do-over salmon to obtain samples of the salmon before handling it to see the quality and note the percentage of possible spoiled cans and general condition of the fish. We received samples of the 1911 pack. We received samples from A. B. Field & Company of the 1912 pack in October or November of that year. We received about two dozen tins, cut them and found them good for do-over fish, fully equal to that of 1911. We thereafter received 900 cases invoiced by A. B. Field & Company at $1 a dozen tins f. o. b. San Francisco. This shipment arrived towards the end of 1912 at a time when all of the wholesalers allow their stocks to run down and we put it in the warehouse until after the first of the year before putting it on the market. We drew some samples from the consignment. From these samples we cut some samples running as high as 6 out of 10 cans absolutely unfit for food. They were so bad you wouldn't care to stay in the room after they were cut; some of them were absolutely dry and others were very soft. I presume we cut 100 or more cans selected at random from various cases; I would say that the salmon would run at least 35 to 50 per cent absolutely unfit for food. The original examination was made in the latter part of February, 1913, and from that time on we tried to sell to various people. Before March 1st on one occasion I cut 10 cans and found 7 of them bad—unfit for food. April 1st I personally drew 25 samples of the salmon; I found 8 cans that were first-class; 7 that would pass without serious criticism,

(Deposition of Walter A. Frost.)

[102] although 2 of them were very dry, 11 of them bad, 8 of them so bad that when we cut them we had to put them out of the office immediately. They were all of like weight. I took 25 cans out of 25 cases that had not been previously sampled. We tried various buyers in Chicago and went to the houses who made a practice of taking goods a little off grade and selling them to restaurant trade, lunch clubs and such trade as that. After we discovered the condition of the salmon we notified the shippers and to protect ourselves we notified the Health Department of the city of Chicago.

Cross-examination.

We received the consignment some time in November, 1912; it was February when we finally arrived at a sale. We first discovered about 40 per cent of the salmon was unfit for consumption late in February or early in March. We notified the Health Department some time in March, 1914; between February, 1913, and March, 1914, we were making repeated efforts to sell. It was only after we found it was absolutely a hopeless case to sell to anybody under any circumstances that we took it to the Health Department. We expect to find some bad cans of salmon in do-over grades in all lots and in other lots we find very few, sometimes more. It is impossible to state the average number of bad cans that are found in a shipment of do-over salmon. I have seen it run as high as 60 per cent.

The 1911 lot was an exceptionally good lot of salmon, the same as in 1910. I should have said 1911

(Deposition of Walter A. Frost.)

and 1910 ran pretty much alike, perhaps 1911 was still better; the percentage of bad salmon in 1911 was very small, so small it was [103] hardly noticeable. I think the entire claims on the 1911 pack amounted to about 15 cases out of 3,000 to 4,000 cases.

When I say it is the custom to handle salmon of this character by sample, I mean it is the custom all over the country. In 1911 the people who purchased the Archer Brand salmon requested that as long as they were do-overs with the uncertainty of do-overs they wanted a case sent by express in order to sample the lot. The reclamations which I referred to amounting to 50 or 60 dollars on the 1911 pack were made because the buyer was guaranteed against spoils, swells and leaks by the shipper. The 1911 pack was sold in July or August. It was a future sale. I have never actually bought and sold any goods in San Francisco, but I wouldn't do the San Francisco merchants the injustice to think they would buy a do-over salmon without first examining the sample; I would think he was a very poor merchant; he is buying something he knows may be very bad and buying something he knows may be very good. The price that he would pay for it might depend entirely upon the character; naturally he is going to examine it.

In handling do-over salmon the amount of bad tins varies considerably; there is no customary percentage. A man who buys do-over salmon expects to find a certain percentage of spoiled cans. [104]

Deposition of W. W. Armstrong, for Plaintiff.

Plaintiff then read in evidence the deposition of W. W. ARMSTRONG, who testified as follows:

I reside in the city of Chicago, and am and have been since June, 1914, Chief of Bureau Food Inspection of the City of Chicago, State of Illinois. J. J. Costello is and was in May and June, 1914, an inspector of canned goods in that department. In June, 1914, we had occasion to examine samples of Archer Brand salmon. I personally examined 6 cans, the balance were examined by the laboratory. The cans were slightly corroded. There was a bad odor which signified putrefaction. As a result of my observation and analysis of the chemist I ordered the salmon to be condemned as unfit for human consumption. The 6 cans were brought to my attention by Inspector Costello.

Cross-examination.

The goods were in a condition of putrefaction. I condemned the salmon on the ground that it was unfit for food, the cans being corroded and the contents putrefied or showing signs of having been resoldered.

Deposition of James J. Costello, for Plaintiff.

Plaintiff then read in evidence the deposition of JAMES J. COSTELLO, who testified as follows:

I was in May and June, 1914, and have ever since been a resident of Chicago, Illinois, and a food inspector for the Health Department of that city. In April and May, [105] 1914, I had occasion to ex-

(Deposition of James J. Costello.)

amine some Archer Brand salmon through a report from Mr. Frost asking us to examine this certain lot of salmon at Importers' Warehouse. He said they wanted to find out whether they had a right to sell it or not. I went there and took 24 samples, the cans bearing the label Archer Brand salmon. I took them to our laboratory for the chemist to examine. I saw the cans after they were opened and observed a very bad odor which indicated putrefaction, and they looked very soft; it was not only putrefied; some of the goods were so badly corroded that in my estimation it would be unfit for human food. I have had six or seven years' experience in examining canned salmon. There were a great many swells in the lot of salmon at the Importers' Warehouse. In selecting samples for examination we did not take swells as they condemned themselves. As a result of this examination the salmon was condemned and sent to the reduction plant and destroyed. The proportion of samples unfit for consumption in my estimation was about 80 per cent; there was quite a lot of swells.

Deposition of Walter A. Frost, for Plaintiff. (Resumed).

Plaintiff then read in evidence the further deposition of WALTER A. FROST, who testified as follows:

I remember giving my deposition in this case in San Francisco. I heard Mr. Costello's and Dr. Armstrong's testimony to-day. The salmon they referred to was the same [106] stored by me in Importers' Warehouse received from A. B. Field & Co.,

(Deposition of Walter A. Frost.)

San Francisco, and is the same salmon referred to by me in San Francisco. The salmon was destroyed.

Deposition of Leslie C. Creasey, for Plaintiff.

Plaintiff then read in evidence the deposition of LESLIE C. CREASEY, who testified as follows:

In 1913 my place of business was Louisville, Kentucky, and my business while there and since was organizing wholesale groceries at Louisville, Evansville, Cairo, Indianapolis, Peoria, St. Paul, Davenport and Omaha. The St. Louis house was the Merchants National Grocery Company. I did the buying for these houses.

This sales ticket which you show me refers to 1000 cases No. 1 Tall Red Alaska Archer Brand Salmon purchased from A. B. Field & Company in 1912, and that is my signature.

Mr. BOLAND.—We offer this in evidence.

Mr. WISE.—We object upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. BOLAND.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 2,

and is as follows: [107]

(Deposition of Leslie C. Creasey.)

Louisville, Ky., Nov. 4th, 1912.

SOLD TO THE MERCHANTS NATIONAL GROCERY CO.,

St. Louis, Mo.

For Account of A. B. Field & Co. San Francisco, Cal.

1000 cs. each Tall Red Alaska ARCHER BRAND Salmon @ $1.00 per dozen.

Tirms F. O. B. Coast.

Shipping point, less 1½% Cash on arrival of goods St. Louis, Mo.

Guarantee against swells, and in compliance with the Food and Drug Act, of June 30th, 1906.

Buyer The Merchants National Grocery.

L. L. CREASEY.

Seller A. B. FIELD & CO.

By A. B. FI*LE*D,

Manager. [108]

The sales ticket reads as follows: (Insert same.)

WITNESS.—(Continuing.) The Merchants National Grocery Company received that salmon at St. Louis; most of it was shipped to Louisville, Evansville, Peoria, Cairo and Indianapolis. I saw a few cans of it at Louisville perhaps four weeks after the salmon arrived. The occasion was because the National Grocery Company shipped some out to their retail customers and had complaints. The salmon was spoiled, bad, smelly, looked mushy. I examined about half a dozen cans selected at random and I remember finding just one can good. This salmon was ordered through Fulton Gordon, broker at Louis-

(Deposition of Leslie C. Creasey.)

ville. He represented it as first class No. 1 salmon. I did not notice any swells. The complaints were made because the salmon was bad. I never had any trouble with any do-over salmon; in buying do-over salmon I never had a complaint before.

Q. Are you familiar with the meaning of the term do-overs?

A. I understand from that that it is salmon that—well, I cannot explain.

We bought it for clean, sweet, edible salmon.

Deposition of David R. Hays, for Plaintiff.

Plaintiff then read in evidence the deposition of DAVID R. HAYS, who testified as follows:

I reside in Chicago, Illinois. In November and December, 1913, I was manager of the Merchants Grocery Company, Evansville, Indiana, one of the chain of stores organized [109] by Mr. Creasey. While there we received some Archer Brand salmon from the Merchants National Grocery Company, St. Louis, about 50 cases. I examined the salmon when we had complaints from customers. I made the examination about October 6, 1913. I examined it twice. The first time I must have examined about 20 cans; some were dry; some had an odor that indicated decay. There was more than 75 per cent bad. The second time I cut 41 cans at random; 29 were bad; 7 dry; 5 smelling. None were good.

Cross-examination.

Some of the salmon examined were swells. I supposed that this salmon was first-class quality. I have never purchased any do-over salmon.

Deposition of Wallace Harker, for Plaintiff.

Plaintiff then read in evidence the deposition of WALLACE HARKER, who testified as follows:

In 1912 I resided in St. Louis and was manager of the Merchants National Grocery Company, one of the series of stores established by Mr. Creasey. I remember in 1912 receiving some Archer Brand salmon in November or December shipped by A. B. Field & Company, of San Francisco; a certain amount of it was shipped to other wholesale houses established by Mr. Creasey. Before we took the car we examined cans from perhaps 8 cases; all was good. One can was slightly [110] dry, but good. I did not examine it again until complaints came in, I should think some time in January, 1913; then we found some swells; some that was stinking, some of them broke of themselves. I should say about one-half of the salmon was bad; I do not remember the proportion of swells. Some of it was shipped out to customers. The portion that was not shipped out remained in the house until the United States Government took charge of it. The portion returned by customers was also in bad condition.

Cross-examination.

In the half that I stated was bad I included swells. I do not remember what proportion were swells. Deducting swells a little less than one-half was bad. We also made a further examination of the cases still in our possession and found swells. The cans smelt up the place and several cans burst in the store. I

(Deposition of Wallace Harker.)

should say the second examination was not more than six or eight weeks after the first. The salmon which I have just referred to was supposed to be first class salmon.

Deposition of John E. Dummeyer, for Plaintiff.

Plaintiff then read in evidence the deposition of JOHN E. DUMMEYER, who testified as follows:

In 1912 I resided in St. Louis and was cashier of the Merchants National Grocery Company, of which Mr. Harker was manager. We received a car of Archer Brand salmon [111] from A. B. Field & Company, San Francisco, about the end of that year, 1000 cases. All but 450 or 500 cases were shipped out to the different houses organized by Mr. Creasey. I did not examine it until complaints started to come in, some time in January, 1913. I guess I must have opened at least 3 or 4 dozen cans. It looked mouldy like, some of it, and had a very bad odor to it. My judgment is they were decayed, rotten; I should say about 50 to 66⅔ per cent was bad. We had shipped salmon to a hundred or so customers. There were only about five or at the most ten per cent of the people who did not object, did not send it back. The same proportion of that salmon was not fit to be used.

Mr. BOLAND.—Q. What was done with that salmon which was not shipped out?

A. The salmon which was kept here was condemned by the United States Government. 300 cases were destroyed.

Mr. WISE.—I move to strike out the question and

(Deposition of John E. Dummeyer.)

answer on the ground the same is incompetent, irrelevant and immaterial.

The COURT.—Motion granted.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 3.

Cross-examination.

We paid $1 a dozen for the salmon less 1½ per cent.

Q. Do you remember how much was paid for that salmon?

A. Yes. I have the invoices here; $3,940.00. The exchange on the bill was $3.95, freight $490 which makes a total of $4,433.95. [112]

Q. You said that one-half to two-thirds of that which you examined was bad? A. Yes.

Q. Did that include swells or exclude swells?

A. I never opened any of the swells. I just opened up the cans and they were bad. We received a credit of about $1,350 from plaintiff. Cans that appeared to be good burst open on the shelves in the stock-room; some of them within a month's time, with a very bad odor.

Q. Do you remember whether a circular was sent out to your trade offering this salmon for sale?

A. Yes, I do.

Q. Can you state generally what that circular contained?

A. The circular contained an announcement to the effect that we were about to receive this salmon; that, from the best of the information which we had, it was

(Deposition of Alonzo Boyd.)

a very good grade of salmon and advised them to put in their orders ahead of time.

Deposition of Alonzo Boyd, for Plaintiff.

Plaintiff then read in evidence the deposition of ALONZO BOYD, who testified as follows:

In 1913 I resided in Indianapolis, Indiana, and was Deputy United States Marshal. On April 21, 1913, I executed a monition in a cause entitled "United States of America against Twenty-four Cases, more or less, containing four dozen cans each of salmon, No. 7402," by seizing the twenty-four [113] cases that were marked "Four dozen Talls Archer Brand, Alaska Salmon, packed for A. B. Field & Company, Incorporated, Agents, San Francisco." I then opened some of those cans and the odor was something fierce. I destroyed the salmon by fire Sept. 29, 1913, pursuant to order of Court. Before doing so I opened two of the cans; they were simply rotten. When I started the fire the odor was so bad that it ran everybody out of the dump. There was a horrible stench. There was a bad odor before we began burning them. I took the salmon from the International Grocery Company.

Deposition of Anna De Versy, for Plaintiff.

Plaintiff then read in evidence the deposition of ANNA DE VERSY, who testified as follows:

In December, 1912, and in 1913, I was bookkeeper of the International Wholesale Grocery Company at Indianapolis, Indiana. In December, 1912, that Company received 50 cases Archer Brand sal-

(Deposition of Anna De Versy.)

mon from Merchants National Grocery Company, St. Louis. The International Wholesale Grocery Company of Indianapolis is one of the companies organized by Mr. L. C. Creasey.

In January, 1913, I saw Mr. Jones open a case of that salmon. After complaints had been made about the salmon we opened 6 or 8 cans and found them all bad. We did not send out any more after that. We shipped out probably ten cases to customers and there were a couple of cases returned. The Government seized the balance. [114]

Cross-examination.

I know what a swell is. I don't remember noticing any swells in the cases referred to. When a can was opened and the cold air struck it, it was spoiled and didn't look good. There was a refund for the amount we paid on the salmon. We were paid by plaintiff. I do not know what a do-over salmon is. This salmon came into our possession through the Merchants National Grocery Company of St. Louis, shipped to us at Mr. Creasey's order.

Deposition of N. B. Wigginton, for Plaintiff.

Plaintiff then read in evidence the deposition of N. B. WIGGINTON, who testified as follows:

In November, 1912, I was manager and buyer for Louisville Grocery Company. I signed the sales ticket submitted to me; the sales ticket referred to is as follows: (Not inserted because mislaid.)

The Louisville Grocery Company subsequently received the salmon referred to in that sales ticket

(Deposition of N. B. Wigginton.)
in November, 1912, and I examined the salmon upon its arrival. We found the goods to run very irregularly; some good and some bad; by bad I mean unfit for human consumption; thereupon we instructed plaintiff's broker, Mr. Gordon, that the only basis upon which we would accept the shipment would be to reduce the draft one-half of its face, i.e., $2,000. The goods were bought to be sound, merchantable fish and to comply [115] with all pure food laws. Subsequently, after continued complaints from customers who had received the salmon, about 250 cases, we examined it; the complaints were as to its quality and condition and came in about ten days after distribution. I examined on the subsequent examination some 50 or 60 cans; the majority of it was rotten, I should say about 90 per cent was rotten. It was subsequently turned over to the City Health authorities. Mr. Montedonico took it from our possession. We got our money back from A. B. Field & Company.

Cross-examination.

Upon arrival from the examination we made of a portion of the shipment possibly 25 per cent was absolutely rotten, others were slightly filled cans and some were all right. Under these conditions we were not required to accept the shipment but out of consideration to the shipper and the agreement to reduce the draft by one-half to give us additional security for the guaranty, we accepted the shipment. We commenced to distribute these goods immediately on their arrival. 219 or 220 cases out of

(Deposition of N. B. Wigginton.)

the 250 cases which we sold were returned to us; about 30 cases remained out. We withdrew the balance from sale. We sell nothing but first class merchantable salmon. We purchased the best grade of salmon from Mr. Gordon. I do not know what do-over salmon is; Mr. Gordon did not tell me that the shipment which we had purchased was do-over salmon. A. B. Field & Co. only refunded us the purchase price on 886 cases. [116]

Deposition of Fulton Gordon, for Plaintiff.

Plaintiff then read in evidence the deposition of FULTON GORDON, who testified as follows:

I remember Mr. Wigginton received some sample cans of salmon from a carload of salmon shipped by plaintiff; I got the samples from the car in which they arrived and brought them to Louisville Grocery Company and cut them before Mr. Wigginton. They didn't cut like the samples which we had received prior and on which we made the sale to the Louisville Grocery Company, these cutting much inferior. A great many of them were bad. We subsequently examined the salmon several times. The Louisville Grocery Company called me over when they had the first lot returned from their customers and complained that they were having them sent back. We got samples from a good many cases which had been returned to Louisville Grocery Company and they cut much worse than the first lot we examined when the car came in. The first examination was made when the car arrived, some time in December, 1912.

(Deposition of Fulton Gordon.)

The second examination, as I remember, was made on the day after Christmas, 1912, or the day after New Year.

Cross-examination.

The original samples which I submitted to Mr. Wigginton were obtained from plaintiff, who had sent them by express to me, and these samples showed good salmon, with the exception of one or two dry cans. I did not know that these were do-overs; nothing was said about their being do-overs. I sold some of this salmon to the Merchants National Grocery Company of St. Louis. I did not sell it as do-over salmon. I sold this salmon both to the Louisville Grocery Company [117] and to the St. Louis firm upon the basis of the samples submitted by A. B. Field & Co. I do not know where these samples were taken from.

Deposition of Dr. Vernon Robbins, for Plaintiff.

Plaintiff then read in evidence the deposition of Dr. VERNON ROBBINS, who testified as follows:

I am city chemist and bacteriologist of Louisville, Kentucky, and was such in December, 1913. I recall at that time making an examination of some Archer Brand canned salmon in my official capacity. Thirty samples were brought in by inspectors Yates and Montedonico. I am also a physician. This salmon was found to be bad; i. e., unfit for human consumption; about 18 out of 20 were unfit for human consumption.

Cross-examination.

There were quite a number of swells among the

(Deposition of Dr. Vernon Robbins.)

cans I examined; 13 were swelling in a pronounced way, and some besides were slightly swollen.

Q. As a physician are you able to say from your examination of this salmon what is the cause of the condition you found? A. Gas formation.

Q. Gas formation in the cans? A. Yes.

Q. What was the cause of the putrefaction?

A. Germ development and bacteria. [118]

Deposition of Dr. Louis Ryans, for Plaintiff.

Plaintiff then read in evidence the deposition of Dr. LOUIS RYANS, who testified as follows:

In September, 1913, I was Deputy United States Marshal of the Western District of Kentucky at Louisville, Kentucky. I destroyed some Archer Brand salmon. On May 26th and May 28th, 1913, I served monition and attachment on National Grocery Company at Louisville and attached 119 cases and 19 extra cans of Archer Brand salmon, appointing Mr. J. B. Fritz, Treasurer of National Grocery Company as custodian thereof. On September 17, 1913, I executed the court's order by destroying 119 cases and 19 extra cans at the city dump in Louisville, which was the same salmon which I had seized. When I destroyed it the condition of the salmon was mighty bad, unfit for human consumption. I opened the cans, cutting them in four different places and throwing them in the dump. The greater part of the salmon was unfit for human consumption. I made no examination of this salmon other than merely to destroy it.

Testimony of Albert Schneider, for Plaintiff.

ALBERT SCHNEIDER, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am a teacher and bacteriologist and microanalyst. I am expert in microscopy in the State Food and Drug Laboratory in Berkeley. I have taught bacteriology [**119**] for 25 years and have had about 25 years' experience in examination of canned food products, including salmon. Assuming that an examination made in July, 1913, of 100 cans of do-over salmon processed in the summer of 1912 showed any percentage of spoilage and the outside of the cans appeared in good condition, that indicates that there was an improper processing, or the use of decomposed material. Improper processing allows decomposition to take place commencing within an hour or two hours after the last processing. Bacteria cannot develop at a high degree of heat. The edible character of the salmon is reduced in direct proportion to the rate of decomposition. Salmon defectively processed, but contained in a hermetically sealed can and at a normal temperature, would become inedible usually within a few days. An organoleptic test will not show the total amount of decomposition. The experience in the laboratory has been that when organoleptic tests reject a certain percentage, when we resort to bacteriological and microscopic methods we get an increase of unfitness for consumption ranging all the way from 25% up to

(Testimony of Albert Schneider.)

100% additional. Frequently in the laboratory we examine canned fish products which give no evidence of decomposition to the senses, but a microscopic and bacteriological examination, nevertheless, discloses an advanced degree of decomposition. I had do-over salmon in mind when I answered. Under ordinary conditions, decomposition sets in immediately, followed by inedibility, as soon as the temperature is sufficiently reduced, and then it proceeds either slowly or rapidly, depending upon temperature conditions largely. If such a can were placed in a warm room, it would decompose [**120**] in 24 hours, so that it could not be used, or, perhaps in less time; perhaps within 18 hours if the temperature were as it is in this room, for example, fairly warm now—that is, I feel it warm—decomposition sufficiently advances to render it inedible would perhaps require say two or three days, and perhaps in the course of the third day some slight swell would be noticeable. In a pack of salmon largely composed of defectives shipped from a long distance, decomposition would manifest itself by swells, blow-outs, in the course of a few weeks, perhaps a month, depending somewhat upon atmospheric conditions.

Take a can of salmon that has been permitted to stand with some defect which gives access to air and facilities for developing bacteria, and has been permitted to stand until that condition has commenced, and then it is processed under conditions which sterilize it thoroughly, then that would absolutely arrest decomposition. Upon being opened some months

(Testimony of Albert Schneider.)

later it would not prove more offensive to the senses or show any advanced stage of decomposition beyond that which obtained at the time it was last sterilized. On opening cans from a consignment of salmon some months after it had been put up and finding a considerable number offensive to the senses, rotten, that would indicate that the salmon was in that condition when it was last sterilized. Those cans would not indicate any swell whatsoever, in all probability.

Cross-examination.

Canned salmon properly processed will not produce a swell whether there are the seeds of decomposition in it at the time of the first sterilization or not, and if a [121] large number of swells develop after the processing, it indicates that the sterilization was not such as to arrest the decomposition that had set in.

Redirect Examination.

Assume that a shipment of salmon is received in October, 1912, and a sample is examined in Louisville, Kentucky, on the 1st day of November, 1912, and found good, the bulk of the salmon is examined at the same place on the 1st day of December, 1912, and found 50% bad, and that the exterior appearance of the tins is normal, it is evident that the material was decomposed at the time of shipment, irrespective of what may have been the fineness of the samples. If salmon has been hermetically sealed in tins and properly sterilized and found a few months afterwards to be absolutely rotten, then it was in that

(Testimony of Albert Schneider.)

condition when it was sterilized, because decomposition does not proceed after sterilization, but it is still there.

Mr. WISE.—(After identifying the signature to following letter as that of A. B. Field.) I offer in evidence a letter dated November 18, 1910. Said letter is as follows:

Letter, November 18, 1910, A. B. Field & Co. to J. P. Haller, Mgr., North Alaska Salmon Co.

San Francisco, Cal., Nov. 8, 1910.

Mr. J. P. Haller, Manager,
North Alaska Salmon Co.,
San Francisco, Calif.

Dear Sir:

Please ship on the steamer "Bear," sailing the 12th inst. for Portland, Oregon,—San Francisco and Portland Steamship Co.—250 cases of ARCHER salmon to apply on our contract.

Have shipment read, A. B. Field & Co., Shippers—their order, notify Wadhams & Kerr Bros., Portland, Oregon. Please ship only printed ends. Mark Diamond "W" Portland. Place in shipping receipts for insurance purposes, the value of $1,250.00. Send bill for the same to this office and we will hand you check covering the amount, as per contract.

Yours very truly,
A. B. FIELD & CO.
By A. B. FIELD.

ABF–MC

P. S.—Kindly send to this office one case of Archer Salmon to use as sample at your earliest convenience. [122]

Testimony of Frederick E. Reade, for Plaintiff.

FREDERICK E. READE, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

I am assistant treasurer of plaintiff and have charge of the books of the company. Plaintiff paid to Eastern purchasers in refunds on the Archer Brand salmon purchased under the 1912 contract about $7,746 in cash.

Cross-examination.

Mr. WISE.—Q. Do you know what made up these figures on what basis these figures were arrived at?

A. These were the actual repayments made by us in cash.

Q. So you have testified, but I mean to say you don't know who calculated these figures?

A. I just paid them out. They were figured up.

Q. All you know about it is, the American Trading Company paid out so much money by way of refund to different customers. A. Yes.

Q. Why or what the claims were, you don't know anything about?

A. I only know in a general way they made these claims and we passed them as correct and I paid them.

Q. But you don't know how they were made up, as to how many—for example, if you paid a man back a thousand dollars, you don't know how much of it went for bad salmon and how much for swells and rusty tins, do you? A. No. [123]

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States of America vs. Three Hundred Cases of Salmon theretofore pending in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Mr. WISE.—I object to the record upon the ground that it is incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 4.

IT IS STIPULATED that in the suit last mentioned the United States libeled said 300 cases of salmon, each of which was labeled as follows:

"Archer 4 doz. Talls Brand
(Design of Indian with bow and arrow)
(Design of fish) Alaska Salmon
Packed for A. B. Field & Co., Inc.,
Agents—San Francisco.

The verified libel, filed May 12, 1913, charges that each of these cases contained four dozen cans of salmon, labeled and branded as follows:

"Archer Brand (Design of Indian with bow and arrow)
Alaska Salmon Red, (Design of Fish)
A. B. Field & Co. Inc., Distributors, San Francisco."

The libel further charges that these cases and cans and their contents were adulterated in violation of section 7 of the Act of June 30, 1906, known as the Food and Drugs Act and were liable to confiscation because the food product contained in the cans was putrid and decomposed and had an offensive odor; that said fish were known as "do-overs" and were in large part filthy, putrid and decomposed animal product and [**124**] substance and wholly unfit for food.

The libel further sets forth that these cases and cans and their contents were unlawfully shipped by A. B. Field & Company for sale in interstate commerce from San Francisco, California, to St. Louis, Missouri, and received at the latter place on or about November 30, 1912, and remained unsold and in the original and unbroken packages and in the possession of the Merchants National Grocer Company.

A warrant of arrest for said Salmon and Monition were thereupon duly issued on said 12th day of May, 1913, and return made on the following day by the United States Marshal for said District showing that they were served at St. Louis, Missouri, on the day last mentioned on Wallace Harker, Manager of Merchants National Grocer Company and that the seizure was made of 289 cases of said salmon on the premises of the latter, and further, that due publication was made of the arrest of said property, time assigned for return of said warrant and of the hearing of said cause, which return was accompanied by proof of such publication.

Thereafter, and on June 5, 1913, the date for the hearing, the said Court rendered its decree, in default of appearance by any claimant of the property so seized, finding the jurisdictional facts and further finding therein that "said 289 cases of salmon were on or about the 30th day of November, 1912, unlawfully shipped for sale in interstate commerce by A. B. Field & Company from the City of San Francisco in the State of California, to the City of St. Louis, in the State of Missouri, to said Merchants National Grocer Company, in violation of section 7 of the Act of Congress of June 30, 1906, known as the Food and Drugs Act; that said salmon when so shipped, as aforesaid, was adulterated in violation of said act of Congress and was liable to seizure, confiscation and condemnation as provided in said Act" for the following reasons, to wit: "That the said food product contained in said cases is putrid and decomposed and has a [**125**] pronounced and offensive bad odor; and that the said fish contained in said cases are known as 'do-overs,' and that the said contents consist wholly or in large part of filthy, putrid and decomposed animal product and substance, and are wholly unfit for use as food."

Condemnation and destruction of said merchandise was thereupon ordered.

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States vs. 24 Cases more or less, containing 4 dozen cans each, of salmon theretofore pending in the United States District Court for the District of Indiana.

Mr. WISE.—I object to the record upon the ground that it is incompentent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 5.

IT IS FURTHER STIPULATED that in the suit last mentioned the United States libeled said 24 cases, more or less, containing four dozen cans each of salmon in possession of the International Grocer Company, an Indianapolis corporation.

The verified libel, filed April 19, 1913, charges that each of these cases was labeled and branded as follows:

"4 doz talls Archer Brand
Alaska Salmon, Packed for A. B. Field
& Co., Inc., Agents, San Francisco."

The libel further charges that the salmon violated the said Pure Food and Drug Act of Congress in that it "consists in part of a filthy, putrid and decomposed animal substance" and had been theretofore transported from Missouri [**126**] to Indiana in violation of said Act.

Attachment and Monition were thereupon issued and the marshal's return sets forth the seizure of said salmon on April 21, 1913, and publication of the notice of hearing. Thereafter, on June 5, 1913, the date for the hearing, defaults of all interested parties

were taken by order reciting that due process had been issued, and on September 26, 1913, said Court rendered and caused to be entered its decree condemning and ordering destroyed said salmon as adulterated, filthy, putrid and decomposed as aforesaid.

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States of America vs. Seventy-five cases of Canned Salmon theretofore pending in the United States District Court for the Western District of Kentucky, at Louisville.

Mr. WISE.—I object to the record upon the ground that it is incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated as

PLAINTIFF'S EXCEPTION No. 6.

IT IS FURTHER STIPULATED that in the suit last mentioned the United States libeled 150 cases of canned salmon, described and marked as aforesaid.

The verified libel, filed May 26, 1913, and amended verified libel filed May 27, 1913, set forth that on December 11, 1912, the Merchants National Grocer Company, doing business in St. Louis, Missouri, shipped and consigned therefrom to the National Grocer Company, Inc., doing business at Louisville, Kentucky, said 150 cases of canned salmon and that

75 of those cases remained in said city of Louisville on the premises of said [127] National Grocer Company, Inc., in the original, unbroken packages in which said article of food had been so shipped and transported.

Said libels further set forth that each case of said salmon contained four dozen cans and were liable to confiscation as being adulterated within the meaning of said Food and Drug Act of Congress, for the reason that at the time of their shipment aforesaid, they "were then and there on said date, and have ever since been, and are now, adulterated, in that the contents of each of said cans consist in part of a filthy and decomposed animal substance."

Thereupon attachment and Monition were duly issued on which the marshal returned that on May 26, 1913, at Louisville, Kentucky, on the premises of the said National Grocer Company he served the process and seized said 75 cases of canned salmon.

The record contains proof of due publication of process and the decree of the Court rendered on September 2, 1913, recites the jurisdictional facts; that no one appeared to claim said property or any part thereof; that the default of all persons was entered; and it was adjudged that the property be condemned as of a deleterious character within the meaning of said Food and Drug Act.

Plaintiff then offered in evidence certified copy of the judgment-roll in the case of United States of America vs. Twenty-eight Cases, more or less, of Archer Brand Salmon theretofore pending in the

United District Court for the Southern District of Illinois, Northern Division.

Mr. WISE.—I object to the record upon the ground that it incompetent, irrelevant and immaterial, a proceeding to which the defendant was not a party.

The COURT.—Objection sustained.

Mr. KNIGHT.—Exception.

The foregoing objection and ruling thereon is designated **[128]** as

PLAINTIFF'S EXCEPTION No. 7.

IT IS FURTHER STIPULATED that in the suit last mentioned the United States libeled 28 cases, more or less, containing Alaska Salmon, in the possession of United Retail Merchants Grocer Company, of Peoria, Illinois.

The verified libel, filed June 6, 1913, describes the salmon as labeled on each of the cases thereof:

"Archer Brand Salmon

(Design of Indian with bow and arrow shooting at a fish)

Alaska Salmon

Packed for A. B. Field & Co., Inc.,

Agents, San Francisco,"

and that each of the four dozen tins contained in each case was labeled:

"Alaska Salmon Red

A. B. Field & Co., Inc., Distributors,

San Francisco,

Archer Brand

(Design of Indian with bow and arrow).

and sets forth that the food product contained in these cans was adulterated, in violation of said Act of Congress, and liable to condemnation and confiscation for the reason that it consisted in whole or in part of a filthy, decomposed and putrid animal substance and of portions of fish unfit for food.

The libel further sets forth that these cases of salmon, adulterated as aforesaid, had been transported from Merchants National Grocer Company in St. Louis, Missouri, to Peoria, Illinois, on December 12, 1912.

The Monition and Writ of Attachment were thereupon issued, returnable the first Monday in August, 1913, and the marshal's return thereon showed seizure of 35 cases and 79 cans of salmon on the premises of the United Retail Merchants Grocer Company, 918 South Adams Street, Peoria, Illinois, and service of the Monition thereon on the last-mentioned day.

The record shows the due publication of the Monition and on Monday, August 4, 1913, the said Court rendered and caused [**129**] to be entered its decree reciting the jurisdictional facts that no one has appeared or answered as a claimant; that the 79 cans and 35 cases of Archer Brand salmon, seized as aforesaid, had been transported in interstate commerce and were subject to confiscation and condemnation because the article of food therein contained was unfit to be used as food; and in whole or in part consisted of a filthy, decomposed and putrid animal substance and portions of fish unfit for food, and direct-

ing the destruction of said salmon. [130]

PLAINTIFF RESTS.

Defendant thereupon made a motion for a nonsuit, which was thereupon denied by the Court.

Testimony of Joseph Durney, for Defendant.

After the Court's denial of defendant's motion for a nonsuit, JOSEPH DURNEY, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am an officer of Griffiths-Durney Company, dealers and marketers of canned foods, including fish, and have been for over 25 years in San Francisco. During that time we have handled about half a million of cases of salmon a year. I did know Mr. Field and I know the defendant. I am familiar with do-over salmon. The difference between do-overs and standard salmon is well recognized by traders of canned salmon. There are a certain amount of defective tins in every salmon pack, no matter how careful we are in canning salmon; wholesale grocers know this; a large number of cans will be bad in re-processing or re-cooking, no matter how careful the canner is. The percentage of bad do-overs will run, I should imagine—it is merely memory now—from 5% to nearly 25% that smell bad. The retailer in selling these goods does not permit the consumer [131] to eat them. He advises his customers that a do-over is a cheap grade of salmon and it is being sold at a cheap price and if it is not good will replace it with another can. That fact is well known to the trade and a do-over salmon is known to the

(Testimony of Joseph Durney.)

trade as having a speculative possibility; that is why there is a difference in price. The speculative element in dealing in do-overs is due to the chance that a buyer takes in getting a lot of bad do-overs.

Cross-examination.

I have never dealt in Archer Brand of salmon. I have not handled do-overs for probably four years. Using the sanitary can there is such a small quantity of do-overs it does not pay to re-cook them and fix them up. Prior to 1912 I handled large quantities of do-overs. The extent would depend altogether upon conditions. In a short pack, of course, you have less than in a large pack. We figure in a pack of salmon there would be about 5% do-overs in the old days; consequently, in handling half a million cases we probably had 25,000 cases of do-overs. I do not think we handled any do-overs from the defendant. [132]

Testimony of Crescent P. Hale, for Defendant.

CRESCENT P. HALE, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am and have been general superintendent of the defendant for 16 years. It was my duty to oversee the pack at all the canneries. They were located at Bristol Bay, Alaska. During those years I have been in Alaska during each packing season, including 1912. The salmon was packed under my supervision and direction. There was no different method in 1912 than had been employed in any previous year; the same machinery was used. The condition

(Testimony of Crescent P. Hale.)

of the do-over salmon as to quality in the summer of 1912 was just the same as the 1911 pack. Defendant had four canneries, two large and two small. My headquarters were at the large canneries. I was not there every day, but I was at some cannery every day. I went from cannery to cannery to inspect the work being done in 1912. Do-overs were not permitted to and did not stand more than three days before being re-cooked so far as I know. There was no difference in the degree of care in handling them between that year's pack and the pack of previous years. In the winter of 1912 I heard complaints about this do-over salmon from Field, but not in any previous year. I drew the samples for plaintiff. I took only one can from each case, taken indiscriminately. I did not attempt to pick out any particular cans for sample purposes. The samples from external appearance and weight were the same as the other tins.

Cross-examination.

I and my sister were financially interested in defendant before it sold out. My impression is that our [133] 1912 pack was larger than our 1911 pack. In answer to a question based upon figures contained in a trade publication that the Pacific Coast salmon pack of 1911 was 2,819,942 cases and in 1912 was 4,064,827 cases, my answer is that I would nŏt say, but if the paper says so, it is probably right. We had the same number of employees in our canneries in 1912 as we had in 1911. I would make the rounds of the four canneries. By water, the way

(Testimony of Crescent P. Hale.)
we travel, one cannery is 75 miles and another 65 miles from the other two, which are right together. To the small ones I would go two or three times a season, but to the two where I was stationed, I would go every day, two or three times a day; these were the larger canneries. Alaska Reds were packed at all of the canneries and put up all do-overs. Smith was superintendent of one of the smaller canneries and Claussen was at the other under my brother, in 1912. In re-processing the salmon in 1912 what was intended to be reprocessed was not put in any definite place; we take it to the menders and leave it there until it is mended. All that had to be re-processed was piled in the same place; no mark or any indication was placed on the can which enables a person in charge to know how long a can has been standing before it is again re-cooked; the day's work that is finished to-day next morning is picked up and is taken right to the mender, and he must finish it up that night; his contract calls for him to finish mending up that night. The foreman of the factory has charge. We do not allow the salmon do-overs to stay over three days; we follow that up very closely; the foreman has charge of that, and I, as superintendent, see that he does it. The only way I have [134] of knowing that the cans to be re-processed have not stood longer than three days, except what the foreman tells me, is to notice whether or not the number of such cans has increased from time to time. My impression is that the total of do-overs in 1912 was 6,500 cases; 5,000 went to plaintiff and I think

(Testimony of Crescent P. Hale.)

Getz Brothers got some. There were no complaints from the other 1,500. The pack was put up in July, 1912; between July first and July 20th the run of salmon never exceeds eighteen days. Five vessels carried the salmon from the canneries to San Francisco in 1912. We used a retort in 1911 and in 1912, but got our vacuum on the cans before using the retort, from the first cooking. We were then using what we call an open exhaust, but no exhaust box the same as a retort. I am not quite sure whether about that time we changed our system of cooking do-overs by using an exhaust box instead of a retort. I am quite sure we changed our system before 1911; it may have been 1910.

Redirect Examination.

Whenever the change was made it made no difference in the method and result of re-processing salmon. The big canneries, each having double the capacity of the small canneries, were two miles apart. In preparing a season's pack we take help with us to Alaska. We cannot tell in advance how big that pack will be. We have a contract with the men that require them to do so many cases a day.

Recross-examination.

We finished packing salmon July 22d or July 24th, 1912. Then we started right in to lacquer the cans, label [135] them and box them, then load them on the vessel.

Testimony of James J. Searle, for Defendant.

JAMES J. SEARLE, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am vice-president of the Haslett Warehouse Company; it operated the Mission Rock Warehouse in 1912. On September 7, 1912, we received ex ship "Standard" 250 cases of Archer Brand salmon; on September 18, 1912, we received ex "Oriental" 620 cases Archer Brand Salmon; on October 5, 1912, we received ex "George Curtiss" 1228 cases Archer Brand Salmon; on October 14, 1912, ex "Olympic" we received 2,993 cases Archer Brand Salmon. That made the total receipts of Archer Brand salmon. We had besides the salmon I have named, by the "Standard," Archer U 241 cases, Archer K 37 cases, Archer T 221 cases. On September 26, 1912, we sent one case to plaintiff and 2 cases on October 22, to plaintiff, one of which was delivered to the Pacific Mail Steamship Company marked S in a diamond with A. T. C. outside, all under order from defendant. The case delivered on September 26 was ex the vessel "Oriental." I do not know from what vessel the other two cases came. On November 15, 1912, we loaded on cars 1,000 cases Archer Brand addressed "St. Louis, Mo"; 900 cases Archer Brand addressed Chicago, and 1,000 cases addressed Louisville, of which 500 were labeled and 500 unlabeled Archer salmon. On November 4, 1912, 72 cases were thrown overboard or dumped by us under defendant's order. [136] The salmon that was dumped was from over-

(Testimony of James J. Searle.)

hauling the cases and removing damaged goods. On December 20, 1912, we dumped 118 more cases of Archer Brand on defendant's order, each case containing 48 tins. Our records show that the Archer Brand furnished plaintiff came from the 1912 pack.

Cross-examination.

On November 26, 1912, title to the 2,100 cases of Archer Brand salmon remaining in the warehouse was transferred from defendant to plaintiff.

Testimony of Oscar Hoffman, for Defendant.

OSCAR HOFFMAN, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am in the merchandise brokerage business, covering canned salmon and other food, and have been about 18 years in San Francisco. A do-over salmon is a salmon which for one reason or other has had to be re-cooked. I account for the disparity in prices between Standard and do-over salmon because of the presumption of a certain amount of salmon in the do-over lot which might not be good stock. It would be impossible to tell without opening the cans. In sampling salmon I would take perhaps one can out of 48 cases. In case of do-over I would be governed by conditions. I would probably decline to make an inspection of do-over salmon because there is such great hazard that I would not care to put my name to any certificate of inspection of do-over stock. I have often sampled salmon for shipment as the [137] best of the prime salmon; others not well mended or they are dry; some of the juices have leaked out

(Testimony of Oscar Hoffman.)

and air let into the can, are not as good quality and absolutely without value. Occasionally you find dryness and loss of juice among prime salmon if they are not well picked out. All cans are tested by tapping and you can tell by the sound if the can has the proper vacuum and as long as there is a vacuum in the can no air has entered the can and the fish is in good condition if it was first-class fish when it was originally put in. The do-over, on the other hand, is a can that has been mended, and frequently when the main leak has been found, a small secondary or even a third leak exists; there are sand holes or pin holes in the plate, so small that you can hardly discover them with a microscope; but there being a vacuum in the can, the air forces an entrance, and as soon as you get air into the can you start fermentation, and the fish in the can will rot or gradually spoil; not certainly, but it will gradually deteriorate and after a long time it will become unfit for food. Now, of course, anybody buying do-overs knows that they take chances on goods of this kind. If the do-overs were all mended, if such a thing were possible, they would be equal to any first-class salmon. I mean all the full weight cans, if they were well mended would be equal to first-class salmon, because the mending does not injure the can or contents.

Cross-examination.

I think a can of salmon to be re-processed could be put aside for a week if it were mended at once after a leak has been discovered before being re-cooked

(Testimony of Oscar Hoffman.)

and yet be all right under ordinary temperature. If you wait three, four or [138] five days before repairing the leak and the can was dry, it would be in bad condition. Supposing someone gives me a can of do-over salmon that has been brought down from Alaska and delivered in November; there is a vacuum in the can and the contents are found rotten two or three months thereafter. I think the reason for that is that probably they must have packed some stale fish originally; it is possible they allowed the can to remain too long before repairing the leak and then re-cooked it when it was not in good condition. As a rule leaks are mended the same day. At the present time, of course, we use a different process. Under the old process, there were a certain number of leak men who were working continuously in the cannery; as long as the work was going on well the leak menders could well keep up with the work, but if the original soldering of the cans was done in a slovenly manner, sometimes by inexperienced men soldering the tops on the can, you would have more leaks than usual, and the leak menders could not well keep up; but a foreman would always detect that by night, and if he saw an extra number of leaks around, he would remedy it the next day; some of those to be mended cans would only be taken care of the next morning or during the following day.

Q. It would depend a little on how busy they were in the cannery, how well they kept up with the repair of leaks in cans?

A. Yes, occasionally; the leak man is a very skilled

(Testimony of Oscar Hoffman.)

man, and occasionally sometimes it has become necessary to take one of these men away, if somebody else was sick or something of that sort and put them at some other work.

Q. If you had an unusual run of salmon I suppose in any one [139] year that was not provided for in advance, there would be a little bit more difficulty in the leak menders keeping up with the work?

A. I do not think so; your machinists cannot do but so much work; they work at a certain gait; no matter how many fish you have on the counters you cannot extend the packing.

The COURT.—It frequently arises in a heavy run that more fish are brought in than can be processed by the capacity of the factory and they have to dump them overboard, don't they?

A. That is very seldom; that is only when extraordinary warm weather sets in; ordinarily, if you get too many fish one day you tell your men not to go out the next morning, but if extraordinarily warm weather sets in it sometimes occurs up there.

Mr. KNIGHT.—Q. Do you ever have an extraordinary run where the men out on the fish dock are unable to get down to the fish that have been first put on the dock, by reason of the fact that so many fish have been piled on top of them, and sometimes you find a decomposed product at the bottom of your quantity of fish.

A. That would be very rare, only in some very small canneries; they would not be on the dock; they would be in the fish boats and fish scows, because

(Testimony of Oscar Hoffman.)

your dock is always cleaned off; there would be a possibility of having a boatful of fish and not taken care of, and being out in the sun.

Q. Mr. Fortman, a swell is the product of gas arising from decomposition of salmon that is caused by the air getting in from the outside of the can, isn't it?

A. Yes. [140]

Q. So that when you have a swell we may say generally you have a can in which the leak has not been completely mended?

A. Probably so; but on the other hand, again, you possibly could produce a swell by imperfect cooking; if your cooking was not well done to commence with, your fish would also decompose and swell.

Q. Even although the cans were hermetically sealed? A. Yes.

Q. You cannot tell, I presume, from looking at a can of salmon ordinarily as to its contents, can you?

A. No.

Redirect Examination.

In standard salmon we generally run from about ¼ to ⅓ of one per cent defective cans. In the do-overs you possibly would find ½ of the cans in reasonably good condition, another ¼ fit for consumption, but they would be partially dry or something of that sort, and ¼ would probably be unfit for use. The ¼ which I stated were fit for consumption but dry would not be detrimental to your health if you ate them, only they would be unsightly and dry. In my experience as president of the Alaska Packers' Association the proportion of do-overs that would

(Testimony of Oscar Hoffman.)

be detrimental to health—rotten—would be very few, possibly there would be 10% that would be. In recooking the salmon it becomes very soft in these do-overs, the second cooking; those naturally would be edible fish; they would not be palatable fish.

Mr. KNIGHT.—Q. Do I understand the experience of [141] the Alaska Packers is, taking a run over a number of years, that about 10 per cent of the do-over pack would be unfit to eat?

A. Well, I do not mean unfit to eat; it would not be eaten; a lot of it would be unsightly, would be soft.

WITNESS.—(Continuing.) I do not know the percentage of do-over salmon put up by the Alaska Packers' Association that was absolutely unfit to eat, because we generally sold our do-overs without reclamation; we had no statistics as to that; they would never come back to us. I don't think I would have heard it if there was any complaint. If you sell do-overs under a guarantee to come up to a certain pack you might as well sell them for prime salmon, because if they can return all the poor ones and keep all the good ones, there is no reason for reducing the price on do-overs.

Q. So you do not think if you should sell 100,000 cans of do-overs, for instance, in this market, and there had happened to be a very large percentage bad, you would have heard of it?

A. No, because as a rule our do-overs were sold after examination; the purchaser had a right to ex-

(Testimony of Oscar Hoffman.)

amine them and pass his own judgment on the goods. We sold through J. K. Armsby & Company; they have made no reclamation on do-overs because we sold as is. I am, therefore, unable to give any estimate. The only reason why I think that 10 per cent figure is in the following manner: Sometimes do-overs would not be sold the year when they are packed; if the salmon market was extraordinarily dull, we would hold them over for the following year, and then overhaul them and take out every swell, and we found that sometimes [142] they would run as high as 10 per cent swelled cans in the do-overs after being in the warehouse in San Francisco six months or a year. We do not overhaul them until they are contracted for. In overhauling six months or a year afterwards it might disclose 10 per cent of swells.

Testimony of Julius Phillips, for Defendant.

JULIUS PHILLIPS, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am connected with Getz Brothers, wholesale grocers, handling canned salmon, and have been for over thirty years. I know the Archer Brand do-over salmon; we handled some of that pack in 1912, that is, sold it to the trade; we never had any complaints about that salmon.

Cross-examination.

We probably had five or six hundred cases; we did not buy them, we handled them on consignemnt basis upon a commission. A large portion of it was, as

(Testimony of Julius Phillips.)

I remember, shipped to Sacramento and the balance was distributed among small dealers in San Francisco or elsewhere in the state. [143]

Testimony of Willard Smith, for Defendant.

WILLARD SMITH, a witness called on behalf of defendant, being duly sworn, testified as follows:

I was employed by defendant in 1912; I was in Alaska that summer; I was foreman under Mr. Hale at Lockanok cannery, one of the large canneries. I know what is meant by overhauling salmon. The cases are opened, each can looked at, swells and rusty tins and very light cans are taken out, and the good put back in the case; bad ones are afterwards dumped. In the fall of 1912 I overhauled the Archer Brand of salmon at Mission Rock; I separated the rusty tins and the swells and the light cans. There was no difference in the methods used at Lockanok cannery in 1912 for re-processing salmon; the same methods were used in 1911. We mend them as soon as we can get to it. We never allow them to stand over a couple of days at most.

Testimony of Chan Way, for Defendant.

CHAN WAY, a witness called on behalf of defendant, being duly sworn, testified as follows:

I worked at Lockanok cannery, in Alaska, in 1912. I take the Chinamen up there and I fix the cans of do-overs. The Chinamen I employed in 1912 were the same as in 1911. I know what a do-over is. It has a little leak, make it light; we fill them up with fish soup and cook them over. Fish soup is good fish

(Testimony of Chan Way.)

cooked whole and then fill the [144] do-overs with the soup. I open, I taste them; if no good I throw them away. I mend leaks every day. I got a contract with the company to mend the leaks every 24 hours or he charge it to me. The longest they stand is about 2 days; I have to finish the leaks every day.

Cross-examination.

I supply Chinamen under contract with the salmon people. I get paid by defendant for every case I put up. If I put up a can of salmon that is no good, the defendant charge me, I think about $1.50 a case. Everything was good in 1911 and 1912. They didn't charge me anything in 1912; every can was good.

Testimony of George F. Smith, for Defendant.

GEORGE F. SMITH, a witness called on behalf of defendant, being duly sworn, testified as follows:

I am the father of Willard Smith; I was employed as superintendent by defendant at the Nushagak Cannery, one of the smaller canneries of the defendant in Alaska. There was no difference in the process employed in the manner of packing do-over Archer Brand in 1911 from 1912. We used the same quality of merchandise and the same quality of cans in the year 1912 as we used in 1911. There was no distinction whatever in the manner of putting up the 1912 pack of Archer [145] Brand salmon from the same brand during the year 1912. We do not allow do-overs to stand at all if we can help it; sometimes they stand probably from 36 to 40 hours. That has always been the rule. They did not stand any longer in 1912 than in any other year.

(Testimony of George F. Smith.)

Cross-examination.

Besides the Lockanok and Nushagak canneries there were the Egakak and Kjickak canneries belonging to defendant on Bristol Bay. The Kjickak and Lockanok were the larger canneries. The foreman is responsible for seeing that the leaks are properly mended and salmon properly re-processed. I myself investigated to see whether the foreman was doing his duty.

DEFENDANT RESTS.

The foregoing is all of the evidence given on the trial.

Thereupon the case was argued by counsel for plaintiff and defendant, respectively. [146]

Prior to the conclusion of the testimony in the case and before the argument to the jury was commenced, plaintiff requested the Court to give to the jury the following instructions:

Instructions to Jury Requested by Plaintiff.

Instruction No. 1: It is admitted here by the pleadings that the salmon in question was packed in the Territory of Alaska and thereafter introduced into, and delivered to the plaintiff for compensation in, the State of California.

Now the Federal Food and Drug Act of June 30, 1906, provides, as far as we are here concerned, that the introduction into any state or territory from any other state or territory of any article of food which is adulterated within the meaning of the act is prohibited; and any person who shall so ship, or deliver for shipment, any such article so adulterated, shall

be guilty of a misdemeanor.

The Food and Drug Act of the State of California of March 11, 1907, also provides that the introduction into this State from any other State or territory, and the sale in this State of any article of food which is adulterated, within the meaning of this act, is prohibited, and that any person who shall so import or receive any such article so adulterated, or who having so received in this State shall deliver for pay, or otherwise, any such article so adulterated, shall be guilty of a misdemeanor.

Each of such acts further provides that food is adulterated within the meaning of the law if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

It is not necessary that the adulteration be injurious to health to bring it within the inhibition of the act.

Nor is it necessary that the adulteration be added by the hand of man. It is sufficient, in the eyes of the law, if it be added by nature.

Instruction No. 1½: It is a rule of law "that all laws in existence when an agreement is made necessarily enter into, and form part of, it, as fully as if they were expressly referred to and incorporated into its terms."

Hence the Pure Food and Drug Acts, to which I have just referred, are to be deemed a part of the contract entered into between the parties, and this contract must be considered as containing an express

provision against the delivery of salmon which is adulterated within the meaning of that act. [147]

Instruction No. 2: If you shall find that the salmon in question, when the cans were opened, was so badly, or otherwise, decomposed as to be unfit for human consumption, you are entitled to believe and find that, at the time the salmon was brought into this port by the defendant and delivered to the plaintiff, the food was adulterated, within the meaning of the law, and its importation and delivery here was, therefore, prohibited.

Instruction No. 3: The laws to which I have referred were passed for the protection of the public, including the plaintiff; and if you shall find that a substantial part of the salmon was decomposed, or in process of decomposition, or contained germs or bacteria that produced decomposition at the time that it was brought to San Francisco by defendant and delivered to plaintiff, then its sale was void and plaintiff is entitled to a verdict for the amount paid by it for the salmon, which, it is agreed, amounted to $16,961.30, with interest on $9,821.30 thereof from the 18th day of November, 1912, and on $7,140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

Instruction No. 3–A: If you shall find that a substantial part of the salmon in question was decomposed, or in process of decomposition, or contained germs or bacteria which produced decomposition at the time it was brought to San Francisco by defendant and delivered to plaintiff, and if you shall find further that plaintiff received this salmon in igno-

rance of its true condition and relying upon its fitness for human consumption, then plaintiff is entitled to a verdict for the amount paid by it for the salmon, which it is agreed amounted to $16,961.30, with interest on $9,821.30 thereof from the 18th day of November, 1912, and on $7,140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

Instruction No. 4: One criterion for determining the edible character of an article prepared in an hermetically sealed can for human consumption is its condition at the time the can is opened for such consumption; for "The condition of the product in the hands of a consumer is the place and time to test its fitness for food."

If it is then either filthy, decomposed or putrid, its condition is such as to make its importation into this port a violation of law, both State and National, and its sale a void transaction; for a sale prohibited by law is void. If, therefore, you shall find that a substantial part of the cans of salmon in question, when opened, were filthy, decomposed or putrid, then you should find that the salmon was adulterated within the meaning of the law when it was originally brought into this port. Its sale, therefore, being void, plaintiff is entitled to recover the amount paid to defendant for the salmon, with interest thereon from the time of payment to the time when your verdict is rendered. [148]

Instruction No. 5. A shipper of merchandise prohibited by the Pure Food Acts is responsible for the act of sending, even although he may be wholly

unaware of the condition of the article shipped, or may have nothing to do with such condition except as possession or ownership of the article make him responsible.

Ignorance by a packer or manufacturer of the unfitness for human consumption of an article packed or prepared by him, like ignorance of the law, does not excuse him, or make valid a transaction otherwise invalid.

Instruction No. 6. You are further instructed that when anyone sells an article of any kind

> "although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use, even although the seller expressly refuses to warrant the condition of the article and gives the purchaser an opportunity of inspecting it."

This is especialy true in view of the State and Federal Pure Food Acts.

This rule rests

> "upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as 'the purchaser cannot be supposed to buy goods to lay them on a dung hill,' * * * it will not be assumed that the seller desires to obtain money for a worthless article.

"So that, upon this issue, after considering all the evidence, if you find"

therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased and was incapable of being used for human consumption, it wil be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time.

Instruction No. 7. The contract made between the parties to the suit provided, among other things, that the "Archer" brand of salmon was to be overhauled in San Francisco by the defendant and all swells and rusty tins were to be taken therefrom, after which no reclamation of any nature was to be allowed, as far as swells and rusty tins were concerned; but the contract did not and could not, in view of the Pure Food Acts of Congress and of the Legislature of this State, provide that the purchaser, who is the plaintiff, could be compelled to accept salmon which was adulterated within the meaning of those Acts, even if plaintiff did not inspect the salmon before taking delivery. [149]

Instruction No. 8. I further charge you that if you shall find that defendant misled plaintiff respecting the condition of the salmon, before its delivery to plaintiff, by leading the latter to believe that the salmon was edible and as good as, if not better than, do-over salmon of the same brand sold by defendant to plaintiff in previous years, and that thereby plaintiff was induced not to exercise its privilege of inspecting it, and if you shall further find that the salmon did not comply with the representa-

tions so made by defendant concerning it, or with the samples furnished by defendant to plaintiff, but was unmerchantable, decomposed and unfit for human consumption at the time of the delivery thereof, then you are instructed that defendant cannot assert that inspection of the salmon by plaintiff was required and that, in the absence of such inspection, no recovery con be had by plaintiff, since defendant by its conduct, in such event, is prevented from relying upon the defense of inspection; and your verdict should be for the plaintiff.

Instruction No. 9. I further charge you that by the contract in suit defendant warranted that the "Archer" brand salmon therein described should be equal to the 1911 pack of the same brand of salmon. It is admitted that the 1911 pack was edible and fit for human consumption. If you shall find that the salmon delivered to the plaintiff in 1912 was not substantially equal to the 1911 pack of "Archer" brand salmon, then defendant has failed to comply with the contract and plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, i. e., at the time of delivery, if the warranty had been complied with, over the actual value of the salmon at that time.

Instruction No. 10. You are not concerned with the determination of the question as to whether or not a do-over salmon, as the term is commonly understood and used in the canned salmon trade, is an article of commerce that must be treated with suspicion. The contract under which the salmon in

controversy was purchased warranted that this salmon, no matter what the general character or reputation of do-over salmon had been, would conform to a certain standard, that is, would be equal to the pack of the same brand of the year before, which was admittedly suitable for human consumption.

You are, therefore, only concerned with the determination of the question: Was the "Archer" brand pack of 1912 delivered to plaintiff by defendant equal in quality to the "Archer" brand pack of 1911; that is, was the salmon delivered by defendant to plaintiff in the Fall of 1912 suitable for human consumption? [150]

The Court thereupon charged the jury as follows:

The COURT.—Gentlemen, I will detain you but a few minutes, if you will give me your attention, because the issues are rather confined under the evidence and the principles are not intricate.

This, as you are well aware by this time, is an action brought by the plaintiff to recover for an alleged breach by defendant of a written contract for the sale and delivery to plaintiff in San Francisco during the season of 1912, of 5,000 cases of do-over grade, Red Alaska Salmon, of the "Archer" Brand. It is admitted that the salmon was delivered and paid for.

The contract, so far as it relates to the goods in controversy, provides that the shipment was to be overhauled by defendant, the seller, at San Francisco, and all swells and rusty tins were to be taken therefrom, after which "no reclamation of any nature will be allowed"; and that plaintiff was to

have the privilege of inspecting the salmon before taking delivery; and it further guarantees that the salmon shall "be equal to the 1911 pack," as expressed.

The provision that after the removal of the swells and rusty tins "no reclamation of any nature will be allowed" must be understood, in view of the nature of the goods involved and the other provisions of the contract referred to, as meaning that after such removal no reclamation could be had for defects of the character specified, that is, such defects as may usually be ascertained by external inspection at the time of the tins or containers. In other words, while no recovery may be had by the plaintiff for loss suffered through swells or rusty tins developing after such inspection and removal, the provision does not mean that reclamation may not be had for defects, if they existed at the date of delivery, that could not be so discovered or detected, which either rendered the goods unfit for the purpose for which it was dealt in by the parties, or made it of a quality below that of the pack of 1911; otherwise, the provision guaranteeing the fish to be equal to the pack of 1911 would have no effect.

There is no controversy over the fact that the purpose for which the salmon was sold was for human consumption. It was, therefore, the duty of the defendant, under the terms of the contract, and the law as well, to deliver to plaintiff salmon which was, at the time of its delivery, substantially capable, taking and regarding the shipment as a whole, of being used for such purpose, since the Pure Food Law of the

United States forbids the sale for that purpose of decomposed and adulterated food. Therefore, should you find that the salmon was not at the time of its delivery, substantially of a character, that is, over and above the percentage of defective cans usually found in goods of the character of those involved, in condition, taking the shipment as a whole, of being used for human consumption, and that plaintiff did not [151] know and could not have ascertained at the time it took delivery that such was its condition, except by opening the cans and thereby destroying its marketable quality, plaintiff is not precluded from recovery for such defects, and your verdict should be in its favor for the difference between the market value which the salmon would have had at the time of its delivery to plaintiff, had it been of the quality called for, and its actual value as delivered.

And, should you find that the salmon, as a whole or an entirety, by reason of its spoiled condition at the time of delivery, had no real value as a merchantable commodity, there would be an entire failure of consideration, and in that event you should return a verdict in favor of plaintiff for the amount paid by it to the defendant for the salmon, which it is admitted was $16,961.30, together with interest on $9,821.30 thereof from the 18th day of November, 1912, and on $7,140 thereof from the 26th day of November, 1912, the respective dates of payment, to the present time, at the rate of 7 per cent per annum.

As stated, the contract guaranteed the salmon in question to be equal to the 1911 pack of the same

brand. It is admitted that the latter was, at the time of its delivery, in good condition for human consumption. Therefore, should you find that the salmon delivered under this contract was at the time of delivery substantially equal in quality and condition to the salmon delivered in 1911, then the defendant has fully complied with the contract and your verdict should be in its favor.

But if you find that the salmon was not, at the time of its delivery, substantially equal in quality and condition with that of 1911, defendant has not fulfilled its guarantee, and plaintiff will be entitled to a verdict for the excess, if any, of market value which the salmon would have had at the date of delivery had the warranty been complied with, over its actual market value at that time in the condition in which it was delivered.

Should you find that the salmon was, either as a whole or to any substantial extent over and above the usual percentage of spoiled or defective cans, unfit for human consumption at the time of its delivery, ignorance of such fact by defendant would not excuse it from fulfilling its contract to deliver salmon of the character stipulated.

Should you find that the salmon was, at the time of its delivery, by reason of the defects, complained of, as whole, unfit for human consumption, and that at the time plaintiff took delivery and paid the purchase price it was ignorant of such unfit condition, and that it was impossible for plaintiff to then ascertain the condition of the salmon, except by opening the cans, then taking delivery and payment of the purchase

price would not preclude a recovery by plaintiff of the damages it has [152] suffered, if any, from the failure of defendant to comply with the terms of the contract.

Should you find that the salmon, as a whole, was at the time of its delivery substantially of the character called for by the contract, as I have construed it for you, but that some of the swells and rusty tins were inadvertently or unintentionally overlooked by defendant in making its examination, that plaintiff did not exercise its privilege of inspecting such shipment before taking delivery, nor make a claim for reclamation on account of such omission within the time provided by the contract, and was not prevented therefrom by any false statement or act wilfully made or done by defendant with intent to prevent plaintiff from making such claim, then plaintiff cannot recover by reason of any damage flowing from such omission.

Except so far as their provisions may be covered or embraced within the principles that I have stated to you, neither the Pure Food and Drug Act of the United States, nor the Food and Drug Act of this State, which have been referred to before you, are involved in this case.

Now, Gentlemen of the Jury, those are the specific principles for your guidance in passing upon the evidence in this case that pertain to the rights of the parties under this contract. There are certain general principles that you should understand and which perhaps I have sufficiently indicated during the prog-

ress of the trial on various occasions, but I will restate them.

The burden of proof in an action such as this, in a civil action, rests upon the plaintiff to establish by a preponderance of evidence the fact that it relies upon in order to make out a case and entitle it to a recovery. That burden is cast on it because it takes the onus of proof in bringing its case; it has the affirmative, and it must establish those facts by the degree of proof I have indicated or it fails in its action; and if upon any fact which has been here brought to your attention as in issue, upon which you are not satisfied that the truth preponderates in favor of the plaintiff, then the plaintiff *such* be regarded by you as having failed to establish that fact to the degree that the law calls upon it to do.

The jury are the exclusive judges of the facts in the case. With this, the Court has nothing to do; and I may add that in that regard it is always a relief to have an opportunity to cast that burden upon the shoulders of someone else rather than the occupant of the bench. You are here for the purpose of passing upon the facts, and the evidence is therefore addressed solely to you. The Court regulates the trial by directing as a matter of law what shall be considered as pertinent for your consideration, and what shall be excluded; but when evidence is admitted, you alone pass upon its weight and its credibility. Its credibility depends upon the degree [153] of consideration that you deem the evidence of the various witnesses entitles it; you note their appearance upon the stand, the manner of their testi-

mony, and the matter of their testimony. If you are of the opinion that a witness upon the stand has given evidence of bias or prejudice for or against a party, and that his evidence has been colored by that attitude of mind on his part, then of course you must take that into consideration in determining what degree of credibilty you will accord to his entire testimony. Of course, that does not exclude his evidence entirely, however prejudiced the witness may be; he is entitled to have a fair and impartial consideration of his evidence in the light of that fact.

The mere fact that a witness may make a misstatement or a contradiction or be mistaken as manifested by other evidence in the case, does not entirely discredit him. It should make you more careful, of course, in examining his evidence in other respects, but it does not entirely discredit him; but if a witness comes upon the stand and makes a statement which you are satisfied, in the light of the other evidence in the case, or from his manner, or from the contradiction that he makes, is not true, and it was made with the purpose to deceive or lead you into believing that it was true, that fact entirely discredits a witness in the judgment of the jury, unless they are satisfied by all the other evidence in the case that in some respects his evidence is true. But a false statement upon the witness stand is always ground for the jury entirely discrediting a witness and casting his evidence out of their consideration for any purpose in the case.

Now, the evidence, as I say, has all been submitted to you in this case, and I do not propose to comment

upon it. You have heard the respective contentions of counsel; that is their right; they have a right to enlighten you as to their views, and to point your minds to what they deem the proper deductions to draw from the evidence. But, after all, gentlemen, it is not the claims of counsel that are to govern you; it is the conclusion that you reach from a fair and impartial consideration of the evidence itself, entirely untrammeled in your mind by any aspect claimed for it by counsel.

In this case, as I say, the plaintiff must make out its case by a preponderance before it can recover. It must, in the first place, establish to your satisfaction that there has been a breach of this contract by a failure to comply with the terms of the contract in accordance with what the court has advised you that contract means. If it has satisfied you that there has been a breach of this contract, it must furnish you a reasonable basis upon which you can, without speculation, without going out into the realms of conjecture, find with reasonable certainty the damage that it has suffered; but if the plaintiff fails to furnish a jury with that degree of evidence, then, although it may appear that it is entitled to recover, the jury are at liberty to render a [154] verdict for nominal damages, as I suggested the other day. of one dollar or any other insignificant sum. But if you find here that the plaintiff is entitled to recover, and there is evidence upon which you can frame a reasonable conclusion as to the amount that it has suffered, then it will be entitled, within the limits of its prayer, to such amount as you

find, under the principles I have stated to you, it is entitled to recover.

You have observed, not only throughout the argument of counsel, but frequently throughout the trial of the case, that the date of delivery has been adverted to frequently as the crucial point at which the question of the carrying out of this contract must depend. In other words, if the defendant furnished and delivered to the plaintiff salmon that at the time of its delivery substantially complied with the terms of that contract, it has performed that contract and cannot be held responsible for any injury that may have thereafter resulted to the plaintiff through circumstances for which it would not be responsible. If, however, you find from the evidence that at the time of delivery this salmon did not, in the respects that I have indicated to you, comply with that contract, then the defendant would be responsible, because that is the pivotal point at which its responsibility attached or ceased, as the case may have been; its responsibility attached or remained, if it was not delivering the article that was contracted for; its liability and responsibility wholly ceased at that moment if the article at that time was in compliance with the terms of its contract.

Now, I think that with these suggestions you will be enabled to reach a verdict without much difficulty. Under the federal system, the jury must be unanimous in their verdict; they cannot reach a conclusion by less than the entire twelve, as you may under the state system.

The clerk has prepared forms of verdict which you will find will meet your necessities under the instructions that I have given you. In the event you find for the plaintiff, it will be your duty to fill in the blank the amount that you find the plaintiff is entitled to recover, including interest; that is, the principal and interest should not be stated separately; you simply say, "We find for the plaintiff" in such an amount, and that will be the principal and interest. If you find in favor of the defendant, however, there being no counterclaim or affirmative demand on the part of the defendant, it will simply be a finding in favor of the defendant, and the law will attach the consequence to that as to plaintiff's right to costs.

Are there any exceptions?

Mr. KNIGHT.—Will your Honor give us an exception as to each instruction requested on behalf of the plaintiff which the Court did not give and each requested instruction the Court gave in a modified form? **[155]**

The COURT.—I do not think I gave any of your instructions; I extracted the principle.

Mr. KNIGHT.—I do not know whether it may be considered a modification, the extraction of the principle.

The COURT.—You are entitled to an exception. The foregoing exception is designated as "Plaintiff's Ex. No. 8."

Mr. WISE.—I do not understand that it is your Honor's rule that such exceptions may be taken in an omnibus way, but your Honor's attention should be directed to those parts of the court's charge to

which counsel excepts. If that be so, we ask to reserve an exception to that portion of your Honor's charge in which you interpreted the contract as confining the matter of reclamation to swells and rusty tins at the time of delivery or thereafter; to that portion of your Honor's instruction in denying the warranty as the same appears on the contract, and the construction thereof with regard to time of delivery; and one instruction of your Honor that if the value at the time of delivery be found by the jury to be practically nothing, or words to that effect, then there is a total failure of consideration which would entitle the plaintiff to recover its purchase price.

The COURT.—The amount paid.

Mr. WISE.—To that portion of your Honor's charge, and if we might add an exception to your Honor's refusal to charge the jury as requested by defendant in instruction No. 2, instruction No. 4, instruction No. 5 and instruction No. 6. Those are all instructions, if your Honor please, with reference to the interpretation of the contract.

The COURT.—You may retire gentlemen.

(Thereupon, at 11:10 A. M., the jury retired to deliberate upon their verdict; at 12:55 the jury returned into court with a verdict in favor of the plaintiff and assessing damages in the sum of one dollar.)

Mr. KNIGHT.—I do not know whether a verdict is deemed excepted to, your Honor?

The COURT.—I think it is, but you can preserve an exception.

The foregoing exception is designated as

PLAINTIFF'S EXCEPTION No. *9.* **[156]**

Order Settling, Certifying and Allowing Bill of Exceptions.

The foregoing bill of exceptions being now presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions, and that it contains all of the testimony offered and received, and all of the exhibits introduced, and all of the proceedings had on the trial of said cause.

Dated this 26th day of March, 1917.

WM. H. HUNT,

United States *District* Judge for the Northern District of California, Second Division.

[Endorsed]: Filed Mar. 26, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[157]**

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

American Trading Company (Pacific Coast), a corporation, plaintiff in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment entered herein on the 11th day of October, 1916, comes now by Samuel Knight, its attorney, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated April 3, 1917.

SAMUEL KNIGHT and
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[158]**

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the above-named American Trading Company (Pacific Coast), a corporation, plaintiff herein, and makes and files the following Assignment of Errors.

I.

The above named District Court erred in sustaining the demurrer to the third count of the amended complaint herein.

II.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of the original judgment-roll in the case of United States of America vs. Twenty-One Hundred Cases of Canned Salmon, theretofore pending and determined in said District Court of the United States in and for the Northern District of California, and which ruling is designated in the bill of exceptions herein as Plaintiff's Exception No. 1.

The foregoing judgment-roll in substance shows that in this case the United States, on July 12, 1913, filed a duly verified libel against said cases of salmon and said libel sets forth that said twenty-one hundred cases of salmon had been shipped by the North Alaska Salmon Company in interstate commerce from the territory of Alaska to the city and county of San [159] Francisco on the steamers "St. Andrews," arriving at the latter place September 7, 1912, "Oriental," arriving at the latter place September 18, 1912, "Curtis," arriving at the latter place October 5, 1912, and "Olympic," arriving at the latter place October 14, 1912; that said salmon was in the same condition when said libel was filed as it was when shipped from said territory of Alaska to said city and county of San Francisco and has been, ever since the respective times when it reached said city and county of San Francisco, as aforesaid, in the same condition in which it was at the time said libel was filed. Said libel further sets forth that on October 26, 1912, said North Alaska Salmon Company sold said twenty-one hundred cases of salmon to American Trading Company (Pacific Coast); that the fish contained in said twenty-one hundred cases was adulterated under the provisions of section 7, paragraph 6 of the act of Congress of June 30, 1906, known as the Food and Drugs Act, in that said fish consisted in whole or in part of a filthy, decomposed or putrid animal or vegetable substance. Said libel further sets forth that said twenty-one hundred cases of salmon constituted an interstate shipment from said territory

of Alaska to said city and county of San Francisco and at the time of filing said libel was within the jurisdiction of said District Court in the original, unbroken cases. The prayer of said libel was for the seizure and condemnation of said salmon under said act of Congress and for the usual process, and that said American Trading Company (Pacific Coast), and all other persons, firms or corporations having, or pretending to have, any right, title or claim to said salmon be cited to appear and answer.

Said libel contains, as an exhibit thereto, a report from the Secretary of Agriculture of the United States, directed to the United States Attorney for the Northern District of California, dated at Washington, D. C., July 11, 1913, setting forth that said [160] American Trading Company then had in its possession said salmon packed and processed by said North Alaska Salmon Company and transported from said Territory of Alaska to said City and County of San Francisco, and sold and delivered to said American Trading Company November 26, 1912. The report further sets forth the particular steamers upon which said salmon was transported, as aforesaid, and that it was at the time of said report on the premises of Mission Rock Warehouse of the Haslett Warehouse Company at said San Francisco. Said report further sets forth that the cases of said salmon were branded "4 doz. talls Archer Brand Salmon—packed for A. B. Field and Co., Inc. Agents San Francisco," and said cans were labeled "Archer brand Alaska salmon—red—A. B. Field

and Co., Inc., distributors San Francisco." Said report further sets forth that official samples of said salmon analyzed in the Laboratory Bureau of Chemistry at said San Francisco showed that out of one hundred cans twenty-eight per cent of the contents was putrid or sour, that the produce was a "do-over" product, and another analysis of official samples in said laboratory showed thirty-nine per cent of said salmon to be putrid or sour; that said laboratory also reported that the owner of said salmon examined four hundred and seventeen cans and admitted that thirty-two per cent was sour, putrid and decomposed. Said report further contained a recommendation for the seizure and confiscation of said salmon.

Said judgment-roll further shows that a verified answer to said libel was interposed by said American Trading Company (Pacific Coast) as claimant of said salmon, denying that all of said fish was adulterated within the meaning of said Act of Congress, but alleging and admitting that theretofore for the purpose of determining the fitness of said salmon for consumption and after its importation into said port of San Francisco, as set forth in said libel, said claimant made an examination of one [161] hundred cases thereof as a sample and ascertained that twenty-five per cent of the contents of said sample was sour, rotten and putrid; that a considerable quantity of the contents of others of said one hundred cases was also unfit for consumption; that thereafter further examination of said twenty-one hundred cases of salmon was made by said claimant by selecting out of every five cases of the entire lot one

tin which was neither rusty, swelled nor in any way indicated a defective condition, and that of those tins, so selected as aforesaid, one hundred and twenty-six out of the four hundred and seventeen tins, or 30.2 per cent thereof, were found to be sour, rotten and putrid, and that a further considerable quantity of said salmon was found to be unfit for consumption, and that the total amount of said salmon, so found unfit for consumption as the result of said examination, was approximately from sixty-five to seventy per cent of the samples so selected.

Said answer also sets forth that a considerable quantity of the tins containing the salmon referred to in said libel was swelled or discolored and indicated that the contents thereof were not fit for consumption. Said judgment-roll further shows that Monition and Process were issued upon said libel; that said salmon was attached by the United States Marshal for said Northern District of California July 14, 1913; that due notice was given to all persons of the hearing of said cause; that proclamation upon said libel was made; that on September 18, 1913, said cause came on to be heard upon said libel and answer, the default of all parties other than said claimant having been entered, and as the result of said hearing the said District Court directed a decree to be entered for the condemnation and destruction of said salmon "for the reasons and causes in said libel of condemnation set forth." **[162]**

III.

That said District Court erred in sustaining the defendant's objection to the admission in evidence

of a certified copy of the judgment-roll in the case of United States of America vs. Three Hundred Cases of Salmon, theretofore pending and determined in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, and which ruling is designated in said bill of exceptions as Plaintiff's Exception No. 4.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled said three hundred cases of salmon, each of which was labeled as follows: "Archer 4 doz. Talls Brand (Design of Indian with bow and arrow) (Design of fish) Alaska Salmon Packed for A. B. Field & Co., Inc., Agents—San Francisco." The verified libel, filed May 12, 1913, charges that each of these cases contained four dozen cans of salmon, each labeled and branded as follows: "Archer Brand (Design of Indian with bow and arrow) Alaska Salmon Red, (Design of Fish) A. B. Field & Co., Inc., Distributors, San Francisco." Said libel further charges that these cases and cans and their contents were adulterated in violation of section 7 of the act of June 30, 1906, known as the Food and Drugs Act and were liable to confiscation because the food product contained in the cans were putrid and decomposed and had an offensive odor; that said fish were known as "do-overs" and were in large part filthy, putrid and decomposed animal product and substance and wholly unfit for food. Said libel further sets forth that these cases and cans and their contents were unlawfully shipped by A. B. Field & Company for sale in interstate commerce

from San Francisco, California, to St. Louis, Missouri, and received at the latter place on or about November 30, 1912, and remained unsold and in the original and unbroken packages **[163]** and in the possession of Merchants National Grocer Company. A warrant of arrest for said salmon and Monition were thereupon duly issued on said 12th day of May, 1913, and return made on the following day by the United States Marshal for said District, showing that they were served at St. Louis, Missouri, on the day last mentioned on Wallace Harker, Manager of said Merchants National Grocer Company, and that seizure was made of 289 cases of said salmon on the premises of the latter and further that due publication was made of the arrest of said property, time assigned for return of said warrant and of the hearing of said cause, which return was accompanied by proof of such publication. Thereafter and on June 5, 1913, the date of the hearing, the said Court rendered its decree, in default of appearance by any claimant of the property so seized, finding the jurisdictional facts and further finding therein that "said two hundred and eighty-nine cases of salmon were on or about the 30th day of November, 1912, unlawfully shipped for sale in interstate commerce by A. B. Field and Company from the city of San Francisco in the State of California, to the city of St. Louis, in the State of Missouri, to said Merchants National Grocer Company, in violation of Section 7 of the Act of Congress of June 30, 1906, known as the Food and Drugs Act; that said salmon when so shipped, as aforesaid, was adulterated in violation of

said Act of Congress and was liable to seizure, confiscation and condemnation as provided in said Act" for the following reasons, to wit: "That the said food product contained in said cases is putrid and decomposed and has a pronounced and offensive bad odor; and that the said fish contained in said cases are known as 'do-overs,' and that the said contents consist wholly or in large part, of filthy, putrid and decomposed animal product and substance, and are wholly unfit for use as food." Condemnation and destruction of said merchandise was thereupon ordered by said Court. **[164]**

IV.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of a certified copy of the judgment-roll in the case of United States vs. Twenty-four cases, more or less, containing four dozen cans each, theretofore pending and determined in the District Court of the United States for the District of Indiana, and which ruling is designated in said Bill of Exceptions as Plaintiff's Exception No. 5.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled said twenty-four cases, more or less, containing four dozen cans each of salmon in possession of the International Grocer Company, an Indianapolis corporation. The verified libel, filed April 19, 1913, charges that each of these cases was labeled and branded as follows: "4 doz. talls Archer Brand Alaska Salmon, Packed for A. B. Field & Co., Inc., Agents, San Francisco."

Said libel further charges that the salmon violated the said Pure Food and Drug Act of Congress in that it "consists in part of a filthy, putrid and decomposed animal substance" and had been theretofore transported from Missouri to Indiana in violation of said Act. Attachment and Monition were thereupon issued and the Marshal's return sets forth the seizure of said salmon on April 21, 1913, and publication of the notice of hearing. Thereafter, on June 5, 1913, the date of the hearing, defaults of all interested parties were taken by order reciting that due process had been issued, and on September 26, 1913, said Court rendered and caused to be entered its decree condemning and ordering destroyed said salmon as adulterated, filthy, putrid and decomposed, as aforesaid.

V.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of a certified copy [165] of the judgment-roll in the case of the United States of America vs. Seventy-five Cases, more or less, of Canned Salmon, theretofore pending and determined in the District Court of the United States for the Western District of Kentucky, and which ruling is designated in said bill of exceptions as Plaintiff's Exception No. 6.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled one hundred and fifty cases of canned salmon, described and marked as aforesaid. The verified libel, filed May 26, 1913, and amended verified libel, filed May 27, 1913, set

forth that on December 11, 1912, the Merchants National Grocer Company, doing business in St. Louis, Missouri, shipped and consigned therefrom to the National Grocer Company, Inc., doing business at Louisville, Kentucky, said one hundred and fifty cases of canned salmon and that seventy-five of those cases remained in said city of Louisville on the premises of said National Grocer Company, Inc., in the original, unbroken packages in which said articles of food had been so shipped and transported. Said libels further set forth that each case of said salmon contained four dozen cans and were liable to confiscation as being adulterated within the meaning of said Food and Drugs Act of Congress, for the reason that at the time of their shipment aforesaid, they "were then and there on said date, and have ever since been, and are now, adulterated, in that the contents of each of said cans consist in part of a filthy and decomposed animal substance." Thereupon attachment and Monition were duly issued on which the marshal returned that on May 26, 1913, at Louisville, Kentucky, on the premises of the said National Grocer Company he served said process and seized said seventy-five cases of canned salmon. The record contains proof of due publication of process and the decree of the Court, rendered on Septembr 2, 1913, recites **[166]** the jurisdictional facts; that no one appeared to claim said property or any part thereof; that the default of all persons was entered; and it was adjudged that the property be condemned as of a deleterious character within the meaning of said Food and Drugs Act.

VI.

The said District Court erred in sustaining the defendant's objection to the admission in evidence of a certified copy of the judgment-roll in the case of United States of America vs. Twenty-eight cases, more or less, of Archer Brand Salmon, theretofore pending and determined in the District Court of the United States for the Southern District of Illinois, Northern Division, and which ruling is designated in said Bill of Exceptions as Plaintiff's Exception No. 7.

Said certified copy of the judgment-roll last aforesaid in substance shows that in the suit last mentioned the United States libeled twenty-eight cases, more or less, containing Alaska Salmon, in the possession of United Retail Merchants Grocer Company, of Peoria, Illinois, The verified libel, filed June 6, 1913, describes the salmon as labeled on each of the cases thereof "Archer Brand Salmon (Design of Indian with bow and arrow shooting at a fish), Alaska Salmon. Packed for A. B. Field & Co., Inc., Agents, San Francisco," and that each of the four dozen tins contained in each case was labeled "Alaska Salmon Red A. B. Field & Co., Inc., Distributors, San Francisco, Archer Brand (Design of Indian with bow and arrow)," and sets forth that the food product contained in these cans was adulterated, in violation of said Act of Congress, and liable to condemnation and confiscation for the reason that it consisted in whole or in part of a filthy, decomposed and putrid animal substance and of portions of fish unfit for food. Said libel further sets forth that these cases of salmon,

adulterated as aforesaid, had been transported from Merchants National Grocer Company in St. Louis, Missouri, to **[167]** Peoria, Illinois, on December 12, 1912. A Monition and Writ of Attachment were thereupon issued, returnable the first Monday in August, 1913, and the Marshal's return thereon shows seizure of thirty-five cases and seventy-nine cans of salmon on the premises of the United Retail Merchants Grocer Company, 918 South Adams Street, Peoria, Illinois, and service of said Monition on the last-mentioned day. The record shows the due publication of said Monition, and on Monday, August 4, 1913, the said Court rendered and caused to be entered its decree reciting the jurisdictional facts; that no one has appeared or answered as a claimant; that said seventy-nine cans and thirty-five cases of Archer Brand Salmon, seized as aforesaid, had been transported in interstate commerce and were subject to confiscation and condemnation because the article of food therein contained was unfit to be used as food; and in whole or in part consisted of a filthy, decomposed and putrid animal substance and portions of fish unfit for food, and directed the destruction of said salmon.

VII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 1, reading as follows:

> It is admitted here by the pleadings that the salmon in question was packed in the Territory

of Alaska and thereafter introduced into, and delivered to the plaintiff for compensation in, the State of California.

Now the Federal Food and Drug Act of June 30, 1906, provides, as far as we are here concerned, that the introduction into any state or territory from any other state or territory of any article of food which is adulterated within the meaning of the act is prohibited; and any person who shall so ship, or deliver for shipment, any such article so adulterated, shall be guilty of a misdemeanor.

The Food and Drug Act of the State of California of March 11, 1907, also provides that the introduction into this State from any other state or territory, and the sale in this state of any article of food which is adulterated, within the meaning of the Act, [168] is prohibited, and that any person who shall so import or receive any such article so adulterated, or who having so received in this state shall deliver for pay, or otherwise, any such article so adulterated, shall be guilty of a misdemeanor.

Each of such acts further provides that food is adulterated within the meaning of the law if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not.

It is not necessary that the adulteration be injurious to health to bring it within the inhibition of the act. Nor is it necessary that the

adulteration be added by the hand of man. It is sufficient, in the eye of the law if it be added by nature.

This exception is designated in said bill of exceptions as Plaintiff's Exception No. 8.

VIII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 1½, reading as follows:

> It is a rule of law "that all laws in existence when an agreement is made necessarily enter into, and form a part of it, as fully as if they were expressly referred to and incorporated into its terms." Hence the Pure Food and Drugs Act, to which I have just referred, are to be deemed a part of the contract entered into between the parties, and this contract must be considered as containing an express provision against the delivery of salmon which is adulterated within the meaning of that act.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

IX.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 2, reading as follows:

> If you shall find that the salmon in question when the cans were opened, was so badly, or

otherwise, decomposed as to be unfit for human consumption, you are entitled to believe and find [169] that, at the time the salmon was brought into this port by the defendant and delivered to the plaintiff, the food was adulterated, within the meaning of the law, and its importation and delivery here was, therefore, prohibited.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

X.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 3, reading as follows:

The laws to which I have referred were passed for the protection of the public, including the plaintiff; and if you shall find that a substantial part of the salmon was decomposed, or in process of decomposition, or contained germs or bacteria that produced decomposition at the time that it was brought to San Francisco by defendant and delivered to plaintiff, then its sale was void and plaintiff is entitled to a verdict for the amount paid by it for the salmon, which, it is agreed, amounted to $16,961.30, with interest on $9821.30 thereof from the 18th day of November, 1912, and on $7,140 thereof from the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XI.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, and as an alternative instruction to said proposed or requested instruction No. 3, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 3A, reading as follows:

> If you shall find that a substantial part of the salmon in question was decomposed, or in process of decomposition, or contained germs or bacteria which produced decomposition at the time it was brought to San Francisco by defendant and delivered to plaintiff, and if you shall find further that plaintiff received this salmon in ignorance of its true condition and relying upon its fitness for human consumption, then plaintiff is entitled to a verdict for the amount paid by it for the salmon, which it is agreed amounted to $16,961.30, with interest on $9,-821.30 thereof from the 18th day of November, 1912, and on $7,140 thereof from [170] the 26th day of November, 1912, to the present time, at the rate of 7% per annum.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 4, reading as follows:

One criterion for determining the edible character of an article prepared in an hermetically sealed can for human consumption is its condition at the time the can is opened for such consumption; for "The condition of the product in the hands of a consumer is the place and time to test its fitness for food."

If it is then either filthy, decomposed or putrid, its condition is such as to make its importation into this port a violation of law, both state and national, and its sale a void transaction; for a sale prohibited by law is void. If, therefore, you shall find that a substantial part of the cans of salmon in question, when opened, were filthy, decomposed or putrid, then you should find that the salmon was adulterated within the meaning of the law when it was originally brought into this port. Its sale therefore, being void, plaintiff is entitled to recover the amount paid to defendant for the salmon, with interest thereon from the time of payment to the time when your verdict is rendered.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XIII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 5, reading as follows:

A shipper of merchandise prohibited by the Pure Food Acts is responsible for the act of sending, even although he may be wholly unaware of the condition of the article shipped, or may have nothing to do with such condition except as possession or ownership of the article makes him responsible. [171]

Ignorance by a packer or manufacturer of the unfitness for human consumption of an article packed or prepared by him, like ignorance of the law, does not excuse him, or make valid a transaction otherwise invalid.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XIV.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 6, reading as follows:

You are further instructed that when anyone sells an article of any kind, "Although there is no implied warranty as to quality in the sale of personal property, the seller is held to the duty of furnishing property, in compliance with the contract of sale, that is at least merchantable or salable, and to this we may add that it shall be capable of being used, if intended for use, even although the seller expressly refuses to warrant the condition of the article and gives the purchaser an opportunity of inspecting it."

This is especially true in view of the state and federal Pure Food Acts. This rule rests "upon the presumption that both buyer and seller are acting honestly and with no intention to cheat or defraud, and, as 'the purchaser cannot be supposed to buy goods to lay them on a dung hill,' * * * it will not be assumed that the seller desires to obtain money for a worthless article. * * * So that, upon this issue, after considering all the evidence, if you find" therefrom that the salmon received by the plaintiff was worthless and unfit for the purpose for which it was purchased and was incapable of being used for human consumption, it will be your duty to return a verdict for the plaintiff for the amount paid for this salmon, with interest to the present time.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8. [172]

XV.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 7, reading as follows:

The contract made between the parties to the suit provided, among other things, that the "Archer" brand of salmon was to be overhauled in San Francisco by the defendant and all swells and rusty tins were to be taken therefrom, after which no reclamation of any nature was to be allowed, as far as swells and rusty tins

were concerned; but the contract did not and could not, in view of the Pure Food Acts of Congress and of the Legislature of this State, provide that the purchaser, who is the plaintiff, could be compelled to accept salmon which was adulterated within the meaning of those acts, even if plaintiff did not inspect the salmon before taking delivery.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XVI.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 8, reading as follows:

I further charge you that if you shall find that defendant misled plaintiff respecting the condition of the salmon, before its delivery to plaintiff, by leading the latter to believe that the salmon was edible and as good as, if not better than "do-over" salmon of the same brand sold by defendant to plaintiff in previous years, and that thereby plaintiff was induced not to exercise its privilege of inspecting it, and if you shall further find that the salmon did not comply with the representations so made by defendant concerning it, or with the samples furnished by defendant to plaintiff, but was unmerchantable, decomposed and unfit for human consumption at the time of the delivery thereof, then you are instructed that defendant cannot assert that in-

spection of the salmon by plaintiff was required and that, in the absence of such inspection, no recovery can be had by plaintiff, since defendant by its conduct, in such event, is prevented from relying upon the defense of inspection; and your verdict should be for the plaintiff.

This exception is also designated in said bill of exceptions [173] as Plaintiff's Exception No. 8.

XVII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 9, reading as follows:

I further charge you that by the contract in suit defendant warranted that the "Archer" brand salmon therein described should be equal to the 1911 pack of the same brand of salmon. It is admitted that the 1911 pack was edible and fit for human consumption. If you shall find that the salmon delivered to the plaintiff in 1912 was not substantially equal to the 1911 pack of "Archer" brand salmon, then defendant has failed to comply with the contract and plaintiff is entitled to recover the excess, if any, of the value which the salmon would have had at the time to which the warranty referred, i. e., at the time of delivery, if the warranty had been complied with, over the actual value of the salmon at that time.

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XVIII.

The said District Court erred in refusing to give to the jury, as a part of said Court's charge thereto, an instruction proposed by plaintiff, designated as its proposed or requested instruction No. 10, reading as follows:

> You are not concerned with the determination of the question as to whether or no a "do-over" salmon, as the term is commonly understood and used in the canned salmon trade, is an article of commerce that must be treated with suspicion. The contract under which the salmon in controversy was purchased warranted that this salmon, no matter what the general character or reputation of "do-over" salmon had been, would conform to a certain standard, that is, would be equal to the pack of the same brand of the year before, which was admittedly suitable for human consumption.
>
> You are therefore, only concerned with the determination of the question: Was the Archer brand pack of 1912 delivered to plaintiff by defendant equal in quality to the Archer brand pack of 1911; that is, was the salmon delivered by defendant to plaintiff in the fall of 1912 suitable for human consumption? [174]

This exception is also designated in said bill of exceptions as Plaintiff's Exception No. 8.

XIX.

The said District Court erred in directing a judgment to be rendered and entered in favor of the plaintiff in the sum of $1.00 damages, by reason of

the fact that the evidence introduced in the case shows that plaintiff was damaged in a sum in excess of said amount.

XX.

The verdict of the jury and the said judgment of the District Court entered thereon are contrary to said evidence in this respect that said evidence shows that the salmon herein involved was unfit for human consumption at the time it was transported from Alaska to San Francisco, California, and delivered to plaintiff.

XXI.

The said verdict of the jury and said judgment entered thereon are contrary to said evidence in this respect that said evidence shows that by reason of the inedible condition of said salmon at the time of its transportation and delivery to plaintiff, there was an utter failure of consideration furnished by defendant to plaintiff for the payment by plaintiff to defendant of the sum of $16,961.30.

XXII.

The said verdict of the jury and said judgment entered thereon are contrary to said evidence in this respect that by reason of the inedible condition of said salmon at the time of its transportation and delivery to plaintiff, the latter was damaged in a sum in excess of said amount of $16,961.30.

SAMUEL KNIGHT,
F. T. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Bond.

Upon motion of Samuel Knight, attorney for the plaintiff, American Trading Company (Pacific Coast), a corporation, and upon filing a petition for a writ of error, and an assignment of errors,

IT IS ORDERED that a writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein on the 11th day of October, 1916, and that the amount of bond on said writ of error be, and the same is hereby fixed at the sum of Five Hundred ($500) Dollars; said bond to serve as a cost bond and a supersedeas bond on said writ of error.

Dated April 3, 1917.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [176]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, American Trading Company (Pacific Coast), a corporation, as principal, and C. R. Morse and F. E. Reade, as sureties, are held and firmly bound unto North Alaska Salmon Company, defendant in the above-entitled action, in the full and just sum of Five Hundred ($500) Dollars, lawful money of the United States, to be paid to the said defendant, North Alaska Salmon Company, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this third day of April, 1917.

WHEREAS, the above-named plaintiff, American Trading Company (Pacific Coast), a corporation, has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered on the 11th day of October, 1916, in the District Court of the United States for the Northern District of California, Second Division, in the above-entitled action in favor of the plaintiff therein for $1.00 damages.

NOW, THEREFORE, the condition of this obligation is such [177] that if the above-named American Trading Company (Pacific Coast), a corporation, shall prosecute such writ of error to effect, and answer all damages and costs if it shall fail to make good said plea, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said American Trading Company (Pacific Coast), a corporation, has caused its name to be hereunto subscribed, and its corporate seal to be hereunto affixed by its proper officer thereunto duly authorized, and said C. R. Morse and F. E. Reade have hereunto set their hands and seals this third day of April, 1917.

AMERICAN TRADING COMPANY (PACIFIC COAST),

By C. R. MORSE, Secretary.

C. R. MORSE, Surety.

F. E. READE, Surety.

[Seal American Trading Co.]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

C. R. Morse, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a resident of the county of Alameda, State of California, and is a freeholder within said state; that he is worth the sum of Five Hundred ($500) Dollars, mentioned in the above bond, over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

C. R. MORSE.

Subscribed and sworn to before me this third day of April, 1917.

[Seal] JOHN E. MANDERS,
Notary Public in and for the City and County of San Francisco, State of California. [178]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

F. E. Reade, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a resident of said City and County of San Francisco, State of California, and is a householder within said state; that he is worth the sum of Five Hundred ($500) Dollars, mentioned in the above bond, over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

F. E. READE.

Subscribed and sworn to before me this third day of April, 1917.

[Seal] JOHN E. MANDERS,
Notary Public in and for the City and County of San Francisco, State of California.

Approved.

WM. M. MORROW,
United States Circuit Judge.

[Endorsed]: Filed April 3d, 1917. Walter B. Maling, Clerk. [179]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record on Writ of Error.

To the Clerk of Said Court:

Sir: Please incorporate in the transcript the following:

Amended Complaint; Demurrer Thereto; Answer Thereto; Order Overruling Demurrer in Part and

Sustaining Demurrer in Part; Bill of Exceptions; Verdict of Jury; Judgment Entered Thereon; Original Writ of Error; Petition for same; Order allowing same; Bond; Assignment of Errors, Citation.

4 April, 1917.

SAMUEL KNIGHT,
F. E. BOLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 5, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[180]**

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred eighty (180) pages, numbered from 1 to 180, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the prae-

cipe for record on writ of error, as the same remains of record and on file in the above-entitled cause, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $110.80; that said amount was paid by the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States, in and for the Northern District of California.
[181]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,744.

AMERICAN TRADING COMPANY (PACIFIC COAST), a Corporation,

Plaintiff,

vs.

NORTH ALASKA SALMON COMPANY, a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between American Trading Company (Pacific Coast), a corporation, plaintiff, and North Alaska Salmon Company, a corporation, defendant, a manifest error hath happened to the great damage of said American Trading Company (Pacific Coast), a corporation, plaintiff, as by its complaint appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, in the State of California, on the 30th day of April, 1917, [182] in the said United States Circuit Court of Appeals for the Ninth Circuit to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM W. MORROW, United States Circuit Judge, designated to sit in the United States District Court for the Northern District of California, this 3d day of April, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

By ————————,
Deputy Clerk.

Allowed by:

WM. W. MORROW,
United States Circuit Judge. [183]

Due service and receipt of a copy of the within Writ of Error, and Order Allowing Writ, Citation, Assignment of Errors, and Bond on Writ of Error, is hereby admitted this 3d day of April, 1917.

WISE & O'CONNOR,
Attorneys for Defendant.

[Endorsed]: No. 15,744. In the District Court of the United States, Northern District of California, Second Division. American Trading Company (Pacific Coast), a Corporation, Plaintiff, vs. North Alaska Salmon Company, a Corporation, Defendant. Writ of Error. Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk. [184]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

North Alaska Salmon Company, a Corporation, Defendant, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at the Circuit Court of Appeals of the United States for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to a Writ of Error allowed and filed in the clerk's office of the District Court of the United States for the Northern District of California, Second Division, wherein American Trading Company (Pacific Coast), a corporation, is plaintiff in error and you are defendant in error, to show cause, if

any there be, why the judgment rendered against the said plaintiff in error, as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM W. MORROW, United States Circuit Judge, this 3d day of April, 1917.

WM. W. MORROW,
United States Circuit Judge. [185]

[Endorsed]: No. 15,744. In the District Court of the United States, Northern District of California, Second Division. American Trading Company (Pacific Coast), a Corporation, Plaintiff, vs. North Alaska Salmon Company, a Corporation, Defendant. Citation. Filed Apr. 3, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2974. United States Circuit Court of Appeals for the Ninth Circuit. American Trading Company (Pacific Coast), a Corporation, Plaintiff in Error, vs. North Alaska Salmon Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed April 13, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.